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OR

CHRONICLES AND MEMORIALS OF GREAT BRITAIN AND IRELAND

DURING

THE MIDDLE AGES.

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THE CHRONICLES AND MEMORIALS

OF

GREAT BRITAIN AND IRELAND

DURING THE MIDDLE AGES.

PUBLISHED BY THE AUTHORITY OF HER MAJESTY'S TREASURY, UNDER THE DIRECTION OF THE MASTER OF THE ROLLS.

On the 26th of January 1857, the Master of the Rolls submitted to the Treasury a proposal for the publication of materials for the History of this Country from the Invasion of the Romans to the reign of Henry VIII.

The Master of the Rolls suggested that these materials should be selected for publication under competent editors without reference to periodical or chronological arrangement, without mutilation or abridgment, preference being given, in the first instance, to such materials as were most scarce and valuable.

He proposed that each chronicle or historical document to be edited should be treated in the same way as if the editor were engaged on an Editio Princeps; and for this purpose the most correct text should be formed from an accurate collation of the best MSS.

To render the work more generally useful, the Master of the Rolls suggested that the editor should give an account of the MSS. employed by him, of their age and their peculiarities; that he should add to the work a brief account of the life and times of the author, and any remarks necessary to explain the chronology; but no other note or comment was to be allowed, except what might be necessary to establish the correctness of the text.

The works to be published in octavo, separately, as they were finished; the whole responsibility of the task resting upon the editors, who were to be chosen by the Master of the Rolls with the sanction of the Treasury.

The Lords of Her Majesty's Treasury, after a careful consideration of the subject, expressed their opinion in a Treasury Minute, dated February 9, 1857, that the plan recommended by the Master of the Rolls "was well calculated for the accomplishment of this important national object, in an effectual and satisfactory manner, within a reasonable time, and provided proper attention be paid to economy, in making the detailed arrangements, without unnecessary expense."

They expressed their approbation of the proposal that each Chronicle and historical document should be edited in such a manner as to represent with all possible correctness the text of each writer, derived from a collation of the best MSS., and that no notes should be added, except such as were illustrative of the various readings. They suggested, however, that the preface to each work should contain, in addition to the particulars proposed by the Master of the Rolls, a biographical account of the author, so far as authentic materials existed for that purpose, and an estimate of his historical credibility and value.

Rolls House,
December 1857.

HENRICI DE BRACTON

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INTRODUCTION.

INTRODUCTION.

THE present volume comprises two treatises, the first of which, being on the subject of Warranty, links the then existing system of English law to the waning institutions of feudalism, whilst the second, which treats of Exceptions, connects the same system with the equitable defences of the Roman Procedure, and at the same time marks a considerable advance in the jurisprudence of the English courts. Both treatises form part of one and the same fifth book, in which Bracton, having previously treated of actions *de jure possessorio* in other portions of his work, concludes his labours by discussing the legal incidents of actions *de recto*, in other words the nature of actions in which the ownership of the thing claimed, as distinguished from the right of possession, is put in issue. With this object in view he has already discussed in the first treatise of the fifth book the nature of a *Writ of Right*, and in the second and third treatises the various essoins allowable to the parties and the mode of dealing with defaults. These three treatises form a portion of the fifth volume. He now proceeds to discuss in the fourth and fifth treatises certain formal defences as it were of the tenant, which sometimes baffle effectively the plaintiff's attack. The first of these defences consists in vouching a warrantor, in virtue whereof the tenant is able to transfer the defence of his title to the party, from whom he has derived the property. The second consists in raising an exception to the plaintiff's right to sue, in other words,

in alleging some matter, which disqualifies him from suing, or operates as an answer to the plaintiff's claim in such a way, that his action fails of itself either entirely or partially. After having disposed of these two subjects it would seem to have been Bracton's intention to have treated of the substantial defences of the tenant on the joining of the issue, as may be inferred from what he says in chapter 28 § 5, *secundum quod inferius dicetur in litis contestatione.* Unfortunately, as may be gathered from this and other passages, Bracton's work has either never been completed in accordance with the author's original design, or a portion of it has been suppressed or lost. We incline to the former view and think that the non-completion of the work may be accounted for by a circumstance which is mentioned in Madox's History of the Exchequer, vol. ii., p. 257, viz., that in the year 1259 (42 H. III.) Henricus de Bratton was required to return to the Archives the Rolls of Martinus de Pateshell and of Willielmus de Radleye, who are the two justiciaries of the Bench, with whose judgments Bracton seems to have been most familiar, and whose authority he invokes most frequently in support of his exposition of legal principles and of the mode of their application by the king's justiciaries.

This opinion derives some confirmation from the internal evidence, which the work supplies by its silence as to any changes in the law made after 42 H. III., and by its statement of the law on the subject of actions concerning dower and advowsons, as well as on the subject of homicide *per infortunium*, without noticing the important changes made in the law upon both these subjects by statutes passed in the 43 H. III. On the other hand it appears from a passage in the Treatise de Defaltis, c. 5 § 4, that Bracton had a well considered purpose in using the well known but much disputed phrase of the Roman Law Procedure, "Cum autem per

" errorem aliquando fiat mentio de tempore indebito, " si ipse petens erraverit, poterit intentionem suam " mutare et errorem revocare, et loqui de tempore " alterius regis usque *ad litis contestationem*, scili- " cet quousque fuerit præcise responsum intentioni " petentis, et ita quod tenens se posuerit in magnam " assisam vel defenderit per duellum." Of other circumstances, which may have contributed to prevent Bracton from completing his work, we may speak hereafter; it may be sufficient for the present to allude to the fact that Bracton's intended work has been left incomplete, and that none of the subsequent legists, who undertook to abridge it in its original Latin tongue, or to paraphrase it in the French tongue of the Edwardian Law Courts, have attempted to complete it. We allude more particularly to the authors of the treatises entitled respectively Fleta and Britton.

We have spoken of the first of the two treatises of the present volume, which deals with Warranty, as linking the then existing system of English law to the waning institutions of feudalism. It may be a question, however, whether the obligation of warranty in its application to sockage tenures, as distinguished from military fiefs, was not derived from a system of law of an earlier date than the feudal system. We do not find in any of the Teutonic Codes a recognition of the principle, which was approved in England at the time when the treatise attributed to Glanville was drawn up, and which had received a fuller development in Bracton's time, namely, that there was in all cases of sale an implied warranty on the part of the vendor of his title to sell, and further that where the obligation of warranty was established, the party vouched to warrant was bound to make compensation to the party who vouched him, if he could not make good his warranty and had the means wherewith to compensate him. This alternative was in accordance with the Roman law.

On the other hand a penalty on a fraudulent sale is a feature of the few barbaric codes, which treat of the sale of land, such for instance as the code of the Bavarians and the code of the Visigoths, in both of which we find provisions on the subject of vendors and purchasers. There is, for example, in the Lex Baiuvariorum, Tit. xv., ch. iv., a provision that, if a person should have sold to another a thing which was not his own, he was bound to return to the purchaser the price of the thing and to pay to the true owner double of the price.[1] Of a similar character was the law of the Visigoths, Lib. v., Tit. iv., § viii.[2] Further it would appear from the Burgundian law, Tit. lxxxiv., that no one was allowed to sell his land, unless he had other land in some other place. We have here indeed the preliminary condition which was necessary to give effect to the English law of compensation (excambium), but we find no trace of any analogous restraint upon the sale of land in England, on the contrary the case is provided for, where the vendor has no other land, and the purchaser has been ousted at law by the true owner. In such a case the purchaser had to wait until the vendor should have inherited other property sufficient to make him compensation. We are disposed to think that the justiciaries of the Curia Regis in England under the Angevin monarchs, through the circumstance of there being no settled custom of the realm, were enabled to mould the jurisprudence of the English courts on this subject after

[1] "Et domino is, qui alienam vendere præsumpsit, duplum cogatur exsolvere, nihilominus emptori, qui accepit, pretium redditurus." Corpus Juris Germanici Antiqui. Walter, Tom i., p. 282. 8vo. Berolini, 1824.

[2] Quotiens de vendita vel donata re contentio commoveatur, id est, si alienam fortasse rem vendere vel donare quemcunque constiterit, nullum emptori præjudicium fieri poterit, sed ille, qui alienam fortasse rem vendere aut donare præsumpserit, duplum rei domino cogatur exsolvere. Emptori tamen precium quod accepit redditurus, et pœnam, quam scriptura continet, impleturus, &c. Ibid. p. 519.

the best models of Roman jurisprudence. We speak of the jurisprudence of Rome as distinguished from its written law.

It may be reasonably asked from what source did the barbaric codes derive the rule of an obligation on the part of the vendor to warrant a good title to the purchaser, or in the alternative to make him conpensation if he should be evicted for want of a rightful title. It is evident that this obligation was not a tradition of feudalism as regards England, although the particular obligation which arose from accepting homage from a tenant may have been so. Bracton (ch. ii.) lays it down that a person is bound to warrant through homage and through a fine having been made and through the obligation of charters and other instruments. In the preceding chapter he has stated that any person who has received from another person on the ground of a donation, or a sale, or an exchange, or such like, any land or tenement with an express charter of warranty and sometimes of homage, may vouch him to warrant, except it be expressed in the same charter, that notwithstanding the homage the donor is not bound to warrant nor to make compensation, and thus a convention controls the law. "Likewise," he says, "a person is bound "to warrant sometimes on account of homage even "without a charter." It may be admitted that the obligation of warranty arising upon homage was a tradition of feudalism, but are we to suppose that in the case of a donation, or of a sale, or of an exchange, there was no obligation of warranty, unless the obligation was expressed in the charter of conveyance? If this were so, it is difficult to say whence this absence of obligation was derived, except that it has a savor of conquest as the source of title. Neither the Roman law nor the barbaric codes sanctioned the principle, that a vendor without a title beyond that of possession *de facto* could communicate to a purchaser a good title against all the

world. The Roman law implied warranty, but it might be specially repudiated, and so far it would seem that the king's justiciaries in the reign of Henry III. engrafted a principle of the Roman law upon feudalism, in allowing that a lord, who had accepted homage from a purchaser of land, might repudiate all obligation to warrant his title. For instance it is impossible to read the third book of Glanville upon "Warrantors" without tracing a Roman hand in its provisions, although the final resource of the Duel was of barbaric origin. On the other hand no mention is made of the warranty of land in the *Liber de Legibus Angliæ*, which is of contemporaneous origin with the appointment of Glanville as great justiciar, and was probably compiled by that eminent lawyer, if we believe the account of Roger de Hoveden, his contemporary.[1]

The obligation of warranty under the feudal system seems to have been limited in the earlier times to two cases, in the first of which, the lord having granted land in fee and the feudatory having done homage for the land, the lord in return was bound to defend the tenant's title to the fee. The second case was where dower having been charged on the land the heir took the land under the obligation of warranting to the widow her dower. These are the only two cases of warranty specified in the earliest collection of Norman laws and customs, which were in force before the separation of the duchy of Normandy from the crown of England. It is clear, therefore, that the English courts in the reign of Henry II. were not indebted to the usages of Normandy for their law as to the warranty of land, which had passed by donation, or by sale, or by exchange from one owner to another, nor can we discover in any of the barbaric codes the germs of the English law of warranty. We are disposed, therefore, to regard the

[1] Chronica Magistri Rogeri de Hovedene. Rolls Edition, vol. ii. p. 215.

English law of warranty in Bracton's time as judge-made law, which had grown up out of the decisions of the justiciaries of the Bench, the principles of whose decisions were applied by the justiciaries itinerant to cases as they arose on their circuits, and by the viscounts in their county courts whenever they were empowered by a royal writ to entertain a plea of right. The history of this early period of English law remains still to be written, but we fear that much of that history must ever remain obscure from the circumstance that legal principles were the subjects of oral tradition and the records of the doms or judgments, in which they were applied to cases as they arose, are but fragmentary. For instance much of the legal history of a reign so modern as that of Henry III. must for ever remain unknown because there are no continuous records of the judgments of the Curia Regis, nor are there in fact any Year Books of an earlier date than the reign of Edward I. On the other hand the Authoritative Roll of our statute law extends no further back than the Statute of Gloucester 6 Edw. I. a° 1278. There is reason, however, to believe from the appearance of the Great Roll of the Statutes, which is preserved in the Public Record Office, that at some time or other there were membranes containing laws of an earlier date, which have been detached from the Roll. We have alluded to this fact in the introduction to vol. v., and we feel the more called upon to repeat the observation, inasmuch as Bracton in his chapter on Warranty has preserved to us the record of a lost statute of the reign of Henry III., which was of no slight importance in its bearing upon the practice of vouching the king in those days as a warrantor. There is no trace of this statute to be discovered in the Public Record Office. Mr. William Hardy, the Deputy-keeper of the Public Records, has courteously directed search to be made in the various collections of records under his charge, but there is a

gap in the Close Rolls for the year 1251 as well as in the Abbreviatio Placitorum for that year, and in some years the Rolls are so decayed as to be illegible. The circumstances under which the Statute in question was made are as follows.

Bracton introduces the subject of the king being bound in certain cases to warrant by instancing the case of a tenement, which may have been specially charged with a warranty, passing as an escheat into the hands of the lord the king, and respecting which the tenant alleges that he cannot answer without the king. He further instances other cases, where the king himself is in seisine of the tenant's homage and service, or where the tenant is in possession of a charter of confirmation from the king. It seems to have become a frequent practice in Bracton's time for a tenant, whose object it was to protract a suit in a plea of right, to avail himself without any just grounds of the excuse that he could not answer without the king, in which case the pleasure of the king would have to be awaited, in like manner as in an assise of Novel Disseysine (fol. 212), or in an assise of Mort-Dancester (fol. 218). With a view therefore to put an end to this abuse of the forms of justice Bracton states in his description of the dedication of the Church of the Abbey of Hayles in Gloucestershire (fol. 382 b.), that it was provided and granted in the presence of the king and in the presence of nine bishops and of earl Richard and of several other earls, "That no one henceforth shall name "the king in a judgment (as above stated) unless it be "so, that the king is bound to make compensation, if "the tenant shall lose, and according to what was then "adjudged between the earl of Gloucester and the abbot "of St. Edmunds, because the charters of the abbot, "through which he said that he could not answer "without the king, said only that the king rendered, "granted, and confirmed, and spoke of no warranty "whereby he was bound to make compensation, if the

" abbot should lose. And it is to be known that to say " that I connot answer without the king is nothing else " than to vouch him to warranty, although it is by other " words."

Upon this passage Mr. Reeves in his History of the English Law, vol. 1. ch. vii. p. 424 (edition of 1869), observes that " this provision was an act of the legislature, " and is one of those many Acts of Parliament which are " now lost. The date of this provision is not mentioned " by Bracton."

We are able, however, with the help of Matthew Paris, to fix the date of the dedication of the church of Hayles, which had been built by Richard earl of Cornwall as a votive offering to commemorate his escape from shipwreck. It took place on the Nones of November (5 Nov.) A.D. 1251, according to a brief notice in Matthew Paris' Historia Anglorum, vol. iii. p. 115. Rolls edition. The same author has also given us a very full account of the ceremony observed at the dedication of the church of Hayles, as well as of the expenses incurred on that occasion by earl Richard, which he narrates upon the authority of earl Richard himself.

" Eodem quoque anno (A.D. 1251) nonis Novembris, " vigilia scilicet sancti Leonardi, comes Ricardus sollemp- " niter et magnifice nimis fecit dedicari ecclesiam de " Hales, quam magnis fundaverat sumptibus, et ædificia " construxerat prout in mari voverat, quando a Was- " conia rediens in mari suborta tempestate periclita- " batur, vix portum attingens in Cornubia. Erant " autem in memorata dedicatione præsentes dominus " rex et regina, et fere omnes Angliæ magnates et " prælati, episcopi vero tredecim, qui omnes missam " die dedicationis celebrarunt, quilibet vero ad suum " altare, Lincolniensisque ad majus altare missam " sollempniter valde decantavit. Erat autem dies " Dominica, in qua splendide et ordinate optimates " cum episcopis et aliis carne vescentibus coepulabantur,

" religiosi vero piscium multitudine et varietate re-
" ficiebantur, seorsum collocati. Erantque ibidem
" milites plus quam trecenti. Istius nempe festi
" sollempnis et convivii magnitudinem ad plenum si
" describerem, limites transgredi dicerer veritatis. Mihi
" autem Matthæo Parisiensi super hoc edoceri cupienti,
" ne falsa huic libro insererem, sub indubitata certitu-
" dine Comes significavit, quod omnibus sumptibus
" computatis in ipsius ecclesiæ constructione decem
" millia marcas exposuerat, addens quoddam verbum
" memorabile, immo et commendabile: utinam Deo
" complaceret, ut omnia, quæ in castro de Walingeford
" expendi, tam sapienter et tam salubriter expendissem."
Chronica Majora, vol. v., p. 262, Rolls edition, a° 1251.

We obtain from the same author the further information in his Historia Anglorum, vol. iii. p. 65, under the year 1249, that the church of the abbey of Beaulieu was dedicated in that year in the presence of the king and of his brother earl Richard and of many other magnates and prelates, and that the abbot of Beaulieu consented on that occasion to establish a new house of Cistercian monks at Hayles, so as to enable earl Richard to fulfil his vow, and that he supplied it with twenty monks and thirty brethren. This new establishment became the nucleus of the famous abbey of Hayles, in the erection of which earl Richard incurred what Matthew Paris deemed to be a lavish expenditure, and whither the mortal remains of the founder himself were brought as to their last home in the month of March in the year 1272. Of this latter fact a record is preserved in the Chronicles of the mayors and sheriffs of London in the Liber de Antiquis Legibus, p. 144, of which the MS. is preserved in the archives of the Guildhall of the city of London.

That a statute of the tenor set forth by Bracton was in force in Fleta's time may be inferred from a passage in Fleta, L. vi., cap. 23, § 18, which is to this effect.

"Poterit etiam rex inter alios obligari, vocari tamen " non potest de recto, nec summoniri, et quo casu " dicendum est quod sine rege respondere non poterit, " eo quod cartam suam habet de confirmatione vel " de donatione, et si amitteret, rex ei teneretur per " cartam illam ad escambium: et nisi rex teneatur " ad escambium, *provisum est*, quod prætextu talium " cartarum prolatarum in judicio non supersedeant " justiciarii ad procedendum."

There is no trace of any such provision having been made in any of the early statutes of the reign of Edward I., which dealt with the subject of vouching to warranty, so as to allow us to suppose that Fleta had in his mind legislation of a date later than the reign of Henry III. It is allowable therefore to conclude that Fleta had in view the identical Statute of Hayles, of which Bracton has preserved for us the text. It deserves to be noted that at the time when the church of the abbey of Hayles was consecrated king Henry III. was ruling without a justiciar, or a chancellor, or a treasurer, and it is possible that there may have been an omission to embody the new provision made on that occasion in a royal writ directed to the sheriffs throughout the realm, and to the justiciaries in Eyre, ordering the latter to publish it in their Iter. Such a circumstance would also serve to account for the careless observance of the statute by the justitiaries in Eyre, inasmuch as in the year 1258 the barons of the realm formally complained in their schedule of grievances presented to the king in the parliament of Oxford that the king's justitiaries failed to give effect to the law, where a tenant claimed not to answer without the king.

"§ 12. Item petunt remedium de hoc, quod dominus " rex aliquando pluribus dat per cartam suam aliena " jura, dicens illa esse eschæta sua, unde tales dicunt, " quod non debent nec possunt respondere sine domino

" rege. Et cum justitiarii hoc ostendunt domino regi,
" nihil justitiæ in hac parte factum est."

We are ignorant as to the authorship of Fleta, beyond what is disclosed by the author himself in his Prooemium, which he seems to have borrowed nearly verbatim from Glanville, and to which he has appended the following passage: " Tractatus autem iste, qui Fleta merito pote-
" rit appellari, quia in Fleta de Jure Anglicorum fuit
" compositus, in tres partes dividitur principales." Selden, however, in his *Dissertatio ad Fletam* has shown, that there is good reason from the evidence supplied by the work itself to believe that Fleta was composed shortly after 20 Edw. I., if not in that year; and further from the reference therein to proceedings in the court of the steward of the king's house (Seneschallus Aulæ), that the writer of the work was personally familiar with the Steward's Rolls. Further the writer's familiarity with the law as laid down by Bracton has led Selden to conjecture that he was one of the king's justiciaries, who had been committed to the Fleet prison in 1288 for corrupt practices. On the other hand the Fleet prison is mentioned in Fleta, p. 83, as the prison to which the marshall of the king's exchequer was empowered to transmit prisoners, who had been committed by the barons of the exchequer for debts due to the king, and on this ground it is not unreasonable to suppose that the author may have been a lawyer employed in the household of king Edward I., who had been committed to the Fleet prison for some irregularity in his accounts.

That the law as settled by the Statute of Hayles on the subject of vouching the king as a warrantor was in force in the reign of Edward I. may be gathered from the French treatise, which passes under the name of Britton, and which was probably completed in its present form subsequently to the completion of Fleta. The internal evidence in support of this hypothesis is partly

affirmative and partly negative. The affirmative evidence is of this kind. The writer of Britton cites the Statute of Westminster the Third (Quia emptores terrarum) which was passed in 18 Edw. I., as "a new "Constitution." No subsequent change in the law is noticed by him, and as he states that the penalty for breaking out of prison was death, it may be presumed that he made this statement prior to the enactment of the 23 Edward I., by which the penalty of death for that offence was abolished. These two landmarks serve to guide us to the conclusion that the treatise of Britton was completed sometime between 18 Edw. I. and 23 Edw. I., notwithstanding that Chief Justice Prisot in the reign of Henry VI. has stated that the treatise of Britton was written two years after the Statute of Westminster the First (3 Edw. I.). Lord Chief Justice Coke, however, was not infallible in some of his criticisms upon Bracton, so it may be pardonable for Lord Chief Justice Prisot to have passed too hasty a judgment upon Britton's work, if the reporter has not done the Lord Chief Justice of the Common Pleas some injustice in writing *deux* ans instead of *douze* ans. The circumstance, that in his chapter on Charters Fleta has abridged the text of Bracton without modifying it in accordance with the changes in the law introduced by the Statute of Westminster the Third (Quia emptores terrarum), makes rather against Selden's suggestion that he was one of the king's justiciaries. Mr. F. M. Nichols in his excellent edition of Britton has gone very fully into the question of the authorship of that work, and has pointed out that the passages, in which reference is made to the later statutes of Edw. I., have not the appearance of being interpolations. He is disposed to think that the author of the work was one of the royal clerks. There is also some reason to think that the author of Britton was acquainted with Fleta, and that he has deserted the guiding hand of Bracton in a

matter of ecclesiastical law, on the question of a vicarage merging in a parsonage notwithstanding the living had been taxed by the ordinary for the reasonable support of a vicar. Bracton, fol. 241 b. Fleta, l. v., c. 14, § 9. Britton, l. iv., ch. iii., § 7.[1] It is possible on the other hand that Britton may have been misled by an inaccurate MS. of Bracton's text. Under any circumstance we consider this misstatement of a cardinal point of ecclesiastical law to be conclusive against the opinion that the author of Britton was John le Breton, Bishop of Hereford.[2]

If it be assumed that Britton was completed a few years after Fleta, although it would be a bold conjecture to suppose that the author of Britton was acquainted with the MS. of Fleta, we find the law as to vouching the king to warrant thus laid down, that, where a party simply vouched the king to warrant in virtue of a charter, the assise should not be stayed (l. iii., ch. xi., § 22), but where the tenant produced a charter whereby the king was bound to warrant and to exchange (à la garrauntie et as eschaunges) the assise should stand over, but not otherwise (l. iii., ch. xxii., § 7). No reference however is made to any constitution on the subject, but the ruling of the king's court seems to have been in full accordance with the Statute of Hayles of 1251.

We have been enabled through the courtesy of Mr. William Hardy, Deputy Keeper of the Public Records, to ascertain that there is no record in the Coram Rege Roll of 35 H. III. (Tower Series) of the judgment in the case of the abbot of S. Edmunds vouching the king as a warrantor against the earl of Gloucester, of which

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[1] Bracton's reading is, "et hoc "dico *nisi* taxata fuerit per ordi- "narios ad rationabilem sustenta- "tionem vicarii." Fleta reads, "et hoc *ubi* taxata fuerit."

[2] The authority for this opinion is a passage which occurs in some of the MSS. of the Flores Historiæ of Matthew of Westminster, but which is wanting in others.

Bracton has preserved a notice, as taking place on occasion of the dedication of the church of the abbey of Hayles. There is indeed an entry in the Roll, which passes in the printed list as the Coram Rege Roll of 35 H. III. This entry is of considerable interest, as it has reference to the limitation imposed on suits of mort-dancester by the Statute of Merton, but this Roll from its internal evidence must be assigned properly to 42 H. III., and the error of the printed catalogue shows how desirable it is that the contents of the Coram Rege Rolls themselves should be printed.

PLACITA CORAM REGE [Queen's Bench, Crown side]
M. 14., 35 Henry III. (Tower Series.)
[*This Roll is evidently the Roll of* 42 *Henry* 3.]
Adhuc de Quindena sc̃i Mich̃is.

Norff § Sim̃ Banyard petit vsus Barthm̃ Banyard duas carucat̃ ꝛre ⁊ dimid cum ptiñ in Ristoñ ut jus suū ⁊c. Et unde quidam Rogus antecessor suus fuit seisit⁹ in dñico suo ut de feodo ⁊ jure tempe H. regis avi avi dñi regis qui nūc est anno ⁊ die quo idem Rex fuit vivus ⁊ mortuus capiens inde explet̃ ad valenc̃ ⁊c̃. Et de ip̃o Rogo descendit jus p̃dc̃e ꝛre cuidam Fulconi ut fil ⁊ heredi. Et de ip̃o Fulcone cuidam Rogo ut fil ⁊ heredi. Et de ip̃o Rogo isti Sim̃ qui nūc petit ut fil ⁊ heredi. Et qd̃ tale sit jus suū ⁊c̃. off⁹t ⁊c̃.

Et Barths venit ⁊ dic̃ qd̃ non debet ei inde respondere. Quia dic̃ qd̃ p ꝑvisionē fc̃am apd̃ Mertoñ ꝑvisū fuit ⁊ constitutū qd̃ nullus, implacitatus de aliquo teneñto, teñetur respondere de tam longa seisina scilt de tēpe H. regis avi avi ⁊c. nⁱ aliquis antecessor̃ petentis vl ip̃e petens movet placitū infra annū quo p̃dc̃a ꝑvisio de M⁹toñ fc̃a fuit. Et desicut ip̃e in narrac̃one sua menc̃oem facit de tēpe p̃dc̃i. H. r̃. avi avi. cū ip̃e nᵒ aliquis antec̃ suoz infra annū quo anno ista constituc̃o fc̃a fuit aliquod placitū movebat v eū vl̃ antec̃ suos pet̃ judm̃

Et Sim̃ dic̃ qđ quidam Fulco avus suus infra annū quo p̄dc̃a p̄visio de M^{o}toñ fc̃a fuit inplacitavit quendā Barthm Banỹ antec̃ ip̄ius Barthi de p̄dc̃a t̄ra in Cur̃ Robti fil̃ Walt̄i p quoddam br̃e de r^{o}to. Et postea in Com̃ Norwic̃ in quo Com̃ responsū fuit qđ idem Barths nich̃ juris clamabat in p̄dc̃a t̄ra n^{i} noīe custodie cū Robto Banyard qui tūc fuit infra etatē ⁊ in custodia sua ob quod br̃e ip̄ius Fulconis cassatū fuit. Et qđ ita sit petit qđ inquiratur p p̄riam.

Et q̄ p̄dc̄s Sim̃ nich̃ ostendit p quod ip̄e vł aliquis antecessoz̄ suoz̄ unq̄ implacitavit ip̄m Barthm vł antec̃ suos n^{i} p simplex dictū suū n^{c} potest ostendere quo anno p̄dc̃m placitū fuit in Com̃ vł coram quali vicecom̃ n^{c} ostendit aliquod br̃e p quod placitavit. Considatū est qđ p̄dc̄s Barths ⁊ h̄r̄ sui teneāt in pace quiet̃ de p̄dc̃o Sim̃ ⁊ h̄ed̄ suis imppetuū. Et Sim̃ in mīa.

Thus much for the Statute of 35 H. III. regulating the right of the subject to vouch the king as a warrantor, of which Bracton alone has preserved to us a record. It appears that on this occasion the king held a court previous to the dedication of the church of Hayles, in which he gave judgment in a cause between the earl of Gloucester and the abbot of St. Edmund's, wherein the abbot had alleged that he could not make answer without the king, who had granted and confirmed to him the land in dispute. The king's court decided adversely to the abbot's exception, and it was with a view to prevent in future any such defence being set up, except in cases where the king had undertaken to make compensation, if his grantee should be ousted by a claimant of superior right, that the Statute of Hayles was passed. If a conjecture may be hazarded in explanation of the fact that a statute was superadded to a judgment Coram Rege on this occasion, it may have been so provided by way of precaution, as the judgment touched the rights of an abbot, that the assent of a large body of prelates should be obtained to a provision, which should be binding in

the case of royal grants made to ecclesiastical bodies equally as to lay persons.

We have already mentioned a peculiarity of the English legal system of warranty, under which, if the purchaser of land should be ousted in a suite *De Recto* by a rightful owner, and the vendor should have no other land wherewith to make the purchaser compensation, the purchaser would have to wait until the vendor should have acquired other property. We find, however, a statement of another mode of proceeding (fol. 386 b.), as applicable both to Christians and to Jews, who had no land. After reciting the terms of an alternative writ for the caption of the land of a warrantor up to the value of the compensation to be made to a purchaser, who has been ousted by a claimant of superior right, the chapter is thus continued: "Si Christianus vel Judæus, " qui terram non habuerint, de qua distringi possint, " cum vocati fuerint ad warrantizandum, præcipiatur " vicecomiti quod habeat corpora eorum, quia ibi non " poterit captio terræ fieri ad valentiam. Judæus vero " nihil proprium habere potest, quia, quicquid acqui- " rit, non sibi acquirit sed regi, quia non vivunt " sibi ipsis sed aliis, et sic aliis acquizunt et non sibi " ipsis," p. 50. Both of these passages are omitted in the two Rawlinson MSS., C. 159 and C. 160, and in the two Bodleian MSS., Corbet and Fletewood. On the other hand, the first passage occurs in the Harleian MSS. 656, 763, 817, 3416, and 3422, whilst the second passage is omitted in them all. In contrast to the above MSS. both passages occur in the Harleian MSS. 653 and 1242, and in MS. Reg. 9 E. 15.

As none of the above MSS. can claim to be of an origin coeval with the life of Bracton himself, we cannot appeal to any of them as conclusive that either passage is an interpolation. It is necessary, therefore, to consider what is the *a priori* probability of one or both of the passages being part of Bracton's original text. It

has been shown in the introduction to vol. ii. that Bracton's death may with good reason be assigned to the year 1268. His work therefore must have been completed before the statute of 51 H. III. (a° 1271) forbade the Jews to hold freehold property, more particularly as in Chapter v., § 7 of his First Book, "de "Acquirendo Rerum Dominio" (fol. 13), he says, "Likewise a donation may be made to men under religious "vows, as well as to others to whom gifts may be made. "Likewise to Jews as well as to Christians, unless the "mode of donation imports the contrary;" and he repeats the same observation in Chapter xix., § 4, of the same book (fol. 47 b.). It seems from these passages, that Bracton himself contemplated the possibility of a Jew equally as of a Christian having land wherewith to make compensation, and accordingly he felt called upon to deal with the contingency of the Jew as well as of the Christian not having any such land. That the passage is part of the original text of Bracton derives support from what he states further on in paragraph 13 of the same chapter, p. 57: "When a person who has "been vouched to warrant is a Christian or a Jew, and "has no land in fee, which can be taken into the hand "of the lord the king, or upon which a distress can be "made, let it be enjoined to the viscount that he present "their persons on the first day. And on this matter a "case will be found in Holy Trinity term in the fourth "year of King Henry, concerning Isaac, the Jew of "Norwich, and in Hilary and in Easter terms about the "beginning." It is clear from this passage that Bracton held it to be settled law in his day, that a Jew might possibly be in possession of land, upon which a distress might be made, and that, if he had no such land and was vouched to warrant, the viscount might seize his person and compel his appearance in court. If it be assumed then for the moment that the first of the two passages is in all probability part of the original text of Bracton, it

being in harmony with other passages in his work, let us examine the second passage commencing "Judæus "vero, &c.," which has somewhat the look of a side-note that has found its way into the text, and which seems rather to conflict with what precedes. The passage is in fact descriptive of the normal *status* of the Jews in England, as described in the Collection of Leges Anglicanæ, which Roger de Hoveden has inserted in his Chronicles as having been published by Ranulf de Glanville after he had been appointed Great Justiciar of England, a° 1180. The text of the law applicable to Jews, as set out in the Royal Manuscript in the British Museum, which is in a handwriting of that period (MS. Reg. 14. C. 2.) is as follows:

De Judæis in regno constitutis.

"Sciendum est quoque, quod omnes Judæi, ubicun-
"que in regno sint, sub tutela et defensione domini
"regis debent esse, nec quislibet illorum alicui diviti
"se potest subdere sine regis licentia. *Judæi et om-*
"*nia sua Regis sunt.* Quod si quispiam detinuerit
"eis, pecuniam eorum perquirat rex tanquam suam
"propriam." § 25.

There is therefore no difficulty in supposing that the second passage, "Judæus vero, &c.," is also part of the original text of Bracton. The MS. Reg. 9 E. 15, in which it occurs, is the work of a superior class of scribe, and has been copied after a good original, as it will be found to clear up one or two difficult passages, in which the scribe of the best of the two Rawlinson MSS. has been confused. A strong argument also in favour of both the passages being part of the original text of Bracton is derived from the fact, that within three years after Bracton's death the Statute of 51 H. III. (a° 1271) was passed, of which the text is preserved in the Appendix to the Liber de Antiquis Legibus, p. 235, already referred to as being in the Archives

of the Guildhall of the City of London, and which is as follows :

"Ordinavimus et statuimus pro nobis et hæredibus "nostris, quod nullus Judæus liberum tenementum "habeat in maneriis, terris, tenementis, feodis, red-"ditibus vel tenuris quibuscunque per cartam, do-"num, feoffamentum, confirmationem seu quamcunque "obligationem, vel quocunque alio modo." It is hardly reasonable to suppose that the passage commencing with the words "Judæus vero" has been interpolated after this Statute of 51 Henry III. prohibited Jews from possessing land even as a donation, and it is still more difficult to suppose that it was interpolated after Edward I. came to the throne in 1272, for he treated the Jews far more harshly than his predecessor had done, and he banished them altogether from the realm of England in 1290. It is rather to this latter circumstance that we incline to attribute the omission of the passages, which we have been discussing, from the majority of the extant MSS., of which the handwriting may with good reason be assigned to the latter part of the thirteenth century, or to the early part of the fourteenth century. It deserves note that Fleta, which was written shortly after 1290, makes no mention of the Jews in the portion of the work, which treats of warrantors under a writ of right. It would be a curious problem, if any of the numerous abridgments of Bracton, which are preserved in private libraries, could be shown to be identical with the abridgment of Bracton's work made by Gilbert de Thornton,[1] to ascertain whether the passages in question concerning the

[1] Selden informs us that at the commencement of Thornton's abridgment, which, like the original work of Bracton, began with the words, "in Rege qui recte regit," the first word was written in large coloured and gilt letters, and within it was an illuminated drawing, representing a king seated on his throne with six judges standing on his left side in their robes of office and coiffed.

Jews have found a place in his abridgment. Gilbert de Thornton was Chief Justiciary from 1289 to 1295. He was therefore Chief Justiciary when the Jews were expelled from England in 1290. That measure was determined upon in the May Session of the Parliament preceding the Session in which the Statute of *Quia Emptores* was enacted on 8th July 1290. We might therefore expect that the Chief Justiciary would omit from his abridgment, which according to Selden was made in 20 Edw. I. (a° 1292), the passages in question, which referred to the Jews, as obsolete. Selden informs us that the Chief Justiciary did not insert into his abridgment any of the Statutes made since Bracton's time, but he has omitted many things, for instance, many of the judgments cited by Bracton. On the other hand although the MS. of the Chief Justiciary, which Selden had in his possession, was much impaired by time and many folios of it mutilated, Selden has preserved to us the titles of the eight parts into which it was divided, and the subject of warranty is not specified in any of them.

Bracton before leaving the subject of warranty discusses the case where the king is bound to warrant, and he makes the observation that the king cannot be vouched as private persons are vouched, because he cannot be summoned by writ (ch. ii., § 9.). He has already mentioned, in treating of an assise of Mortdancester (fol. 270 b.), that where the tenant objects that he cannot answer without the king, because he holds his land from the king's gift as in serjeanty or as his escheat, that the pleasure of the king will have to be requested. This is in accordance with what he has previously observed in treating of the dignity of the king, that the proper mode of proceeding in a case in which the king is concerned is by way of petition, since a writ does not run against him (fol. 5 b.). The liability,

however, of the king to warrant in respect of a feoffment of his ancestors did not extend to feoffments made by the kings who reigned before the Conquest, for the king himself was not their heir, and accordingly he was not bound to warrant their feoffments, unless he had by an act of his own confirmed them. But even in cases where the king was bound to warrant, his pleasure had to be awaited, since necessity could not be imposed upon him.

Bracton in Cap. xiv. De Warrantia, fol. 395 b., discusses the question of a tenant vouching a warrantor, who is not resident within the realm, and therefore cannot be distrained if he does not appear. In such a case, if the vouchee should be resident in France or in Germany and will not come, the tenant was not to expect any aid from the king's court, and judgment would have to be pronounced against the tenant, if the party vouched to warrant failed to appear. It was otherwise, however, if the vouchee, though absent from the realm of England, should be resident in Ireland, where the king's writ runs. In such a case the tenant might sue out a writ from the Crown to the king's justiciary in Ireland, commanding him to summon the party vouched by the tenant in England as a warrantor, to show cause why he should not warrant, and likewise to return under seal a record of the trial concerning the warranty. And if it should appear that the party vouched by the tenant ought to warrant, and he should fail to come to England and to defend his tenant, so that judgment should go against the tenant, the tenant was to have compensation from the land of the vouchee in Ireland. The converse course was to be observed, where a tenant in Ireland should have vouched a warrantor who was resident in England.

The treatise on Exceptions, which is the concluding treatise of the fifth and last book of Tottell's edition of Bracton's work, introduces us unexpectedly to many questions of which the decision appertained to the Ecclesiastical Courts, and to certain questions respecting which there was a conflict between the Crown of England and the Holy See, and in which the barons of England asserted and successfully maintained the supremacy of the Crown.

An exception is defined by Bracton as *actionis elisio*, a phrase somewhat difficult of translation, but which we have rendered in English "the parrying of an action." He has elsewhere described an exception as a kind of shield, for as plaintiffs are armed with actions, and are girt as it were with swords, so defendants on the contrary are fortified with exceptions, and are defended as it were with bucklers (fol. 399 b.). It is in dealing with an exception against the jurisdiction of a court that Bracton is led to the consideration of the subject of jurisdiction generally, and of the divisions of it as exercised by the ecclesiastical or by the secular *forum*, as well as of the mode whereby the Court of Christianity may be restrained from meddling with a lay feud, notwithstanding it has the authority of letters from the lord the Pope. In such cases a royal writ of prohibition is to be directed to the party proceeding as well as to the judges of the Court of Christianity, forbidding them to entertain the suit; and after this writ has been issued, the viscount will do nothing to enforce their judgment. One of these writs deserves more especial notice, which was directed to the prior and convent of Rochester during the vacancy of the see of Rochester, and in which the king prohibits the prior and convent of Rochester from suing Edmund, the then Archbishop of Canterbury, in virtue of letters from the lord the Pope for an account of certain payments due from the royal manor to the see of Rochester, but to which the said arch-

bishop was entitled as having the custody of the said bishopric during the vacancy of the see (fol. 403 b.). Another writ of prohibition may be also alluded to, which is of a totally different character, where a husband has claimed to hold for his life *per legem Anglicæ* land which belonged to his wife, upon the pretext that the sons whom he had by his said wife were legitimate, notwithstanding they were born before matrimony was contracted with his said wife. In this case, notwithstanding the party suing in the Court of Christianity has obtained letters from the lord the Pope in order to legitimate his sons in accordance with the Canon Law, a writ of prohibition might be issued to the court on the ground, that no ecclesiastical judge could duly proceed to hold cognizance concerning legitimacy as regards an inheritance and succession to property, unless a trial had been previously commenced in the King's Court, and bastardy had been there objected. In such a case a mandate would be sent to the Ordinary of the place to hold cognizance as to the legitimacy of the claimant (fol. 405.). Bracton further observes that in all such cases where a writ of prohibition has been transmitted to the Court of Christianity, it is the duty of the ecclesiastical judge to consult the king's justiciaries as to the manner in which he should proceed, and the king's justiciaries are to draw up a writ in answer to the consultation advising the ecclesiastical judges to entertain the suit or not, as the circumstances of the case may warrant.

After considering in detail the exceptions which may be raised against the writ itself, Bracton proceeds to discuss the exceptions which may be raised against the person of the claimant, some of which are peremptory, and others only dilatory. Of the latter perhaps the most remarkable is the exception against the person of the claimant on the ground of a defect of nationality *propter defectum nationis* (fol. 415 b.), as if he has been leagued with the enemies of the king, or if he be of fealty

to the king of France, until at least the realms become once more common. This objection he treats more fully in Chapter xxiv. (fol. 427 b.), where he says, if an alien by birth (alienigena) who is of fealty to the king of France brings an action against one who is of fealty to the king of England, no answer shall be made to such a person, at least until the territories become common, nor even if the king has allowed him to plead, because as an Englishman (Anglicus) is not heard, if he implead any one concerning lands and tenements in France, so ought not a native of France (Francigena) and a born alien (alienigena) who is of fealty to the king of France to be heard, if he impleads any one in England. Bracton then goes on to say what is deserving of note: "But "still there are some native Frenchmen in France who "are of fealty to both kings, and have always been so "before Normandy was lost, and afterwards, and who "implead both here and there for the reason that they "are of fealty to both kings, such as William the Earl "Marshall resident in England, and M. de Feynes resi- "dent in France, and several others, and so, however, "that if it should happen that war should arise between "the kings, each of them should personally remain with "him to whom he has done allegiance, and let him do "due service to him with whom he does not personally "array himself."

Fleta, in discussing the same exception in its application to a partner in a claim, says, "vel dicere poterit, "quod nihil juris clamare poterit tanquam particeps, "eo quod est ad fidem regis Franciæ, quia ablieni- "genæ repelli debent in Anglia ab agendo, donec "fuerint ad fidem regis Angliæ, qui Anglici in Francia "ad successionem non admittuntur, donec fuerint ad "fidem regis Franciæ," l. vi., c. 48, § 4. Fleta, however, does not follow up the subject to the extent, to which Bracton does, in recognising instances of fealty due from one and the same individual both to the king

of France and to the king of England. The instances were perhaps rare in Bracton's time and were relics of the period, when the kings of England were also dukes of Normandy, but the principle of the common law seems to have been clear during that period, that in order to be entitled to the privilege of English nationality it was not necessary for a person to have been born within the realm of England, provided he was born within the king's allegiance. Such seems also to have been Lord Coke's opinion in commenting on Littleton, although he overdraws upon Bracton as an authority, if the text of his Institute has not been misrendered in the print of it.

Having defined an alien as one born in a strange country under the obedience of a strange prince or country, Lord Coke goes on to say "and therefore "Bracton saith that this exception *propter defectum* "*nationis*, should rather be *propter defectum sub-* "*jectionis*, or as Littleton saith (which is the surest) "out of the ligeance of the king. Note here Littleton "saith not out of the realme, but out of the ligeance, "for he may be born out of the realme of England, yet "within the ligeance." A difficulty, however, might arise, if an exception had been taken by a tenant against a claimant born out of the realm but within the king's allegiance, on the grounds that he was a bastard, as to the proper Ordinary to whom the question of his parents having been lawfully married should be remitted, and this question seems not to have received any legislative determination before the 25 Edw. III., the true purport of which statute does not seem to have been fully appreciated by any of the various writers, who have treated of the character of the children of British subjects born out of the realm.

But before considering the question as to who would be the proper Ordinary to determine the question of the

lawful marriage of the parents of a British subject born out of the realm but within the king of England's allegiance, whose legitimacy has been impeached when he has set himself up as the true heir in England of his deceased father, it may be as well to consider what was the bearing of the Statute of Merton of 20 Henry III. upon such questions. There seems, according to Bracton's account (fol. 416 b), to have been a distinct question entertained by the king in his court sitting judicially from the question settled by the king in a great council purporting to have been held some months afterwards, and by which a new procedure in the king's court in certain questions of bastardy was formally sanctioned. The difficulty was not of modern origin, although it seems to have reached a crisis under the archbishopric of Edmund Rich, who had been appointed to the see of Canterbury in 18 H. III. (A.D. 1234). According to the Tower Roll of the Placita coram Rege of that year, a copy of which has been printed in the Appendix to the present volume, a constitution was made on Thursday after the Festival of St. Denis (9th October A.D. 1234), under which "it "was provided and granted that thenceforward, when "bastardy should have been objected to a claimant in "the court of the lord the king on the ground that he "was born before matrimony had been contracted be-"tween his father and mother, a case should be trans-"mitted to the bishop of the place to inquire whether "such person was born before or after the marriage of "his parents. And that in such an inquest no appeal "should lie out of the realm." There can be no doubt as to the authenticity of this Roll, which is preserved in the Public Record Office, and which is identical, as regards the names of the members of the king's great council subscribed to it as witnesses, with Bracton's Roll. The presumption is accordingly that the date assigned to this law in Bracton's text is not correct, although Bracton may be perfectly correct in stating "that on "the morrow of St. Vincent's Day, to wit the 23rd day

" of January in 20 H. III., the bishops, with the vene-
" rable father Edmund archbishop of Canterbury at
" their head, protested that they could not answer any
" such question without prejudice to the ecclesiastical
" dignity, and that they requested the king and the
" magnates to give their consent to this, that children
" born before matrimony might be legitimate in all
" respects as children born after it, to which all the
" earls and barons, as many as were there, answered
" with one voice that they were unwilling to change
" the laws of England, which up to that time had been
" in use and approved." According to this account of what took place on the morrow of St. Vincent's Day A.D. 1236 the episcopal body were innovators, and the barons of the realm were the supporters of the ancient customs of the realm of England. Such, however, is not the view, which Bishop Grosseteste of Lincoln took of the issue raised on that occasion between the bishops and the barons, and which must be taken into account, if we would understand the meaning of the struggle, in which the barons refused on that occasion to give way. It would seem from two letters of the famous bishop of Lincoln addressed to William de Ralegh, treasurer of Exeter Cathedral and one of the king's justiciaries, that before the time of Richard de Luci, the great justiciar of Henry II. and the stern opponent of Archbishop Becket, a custom had prevailed in England, of which Bishop Grosseteste gives an account in these words: " Et ut seniorum relatione didici, consuetudo etiam in
" hoc regno antiquitus obtenta et adprobata tales
" (natos ante matrimonium) legitimos habuit et hære-
" des, unde in signum legitimationis nati ante matri-
" monium consuerunt poni sub pallio super parentes
" extento in matrimonii solemnizatione."[1] This ancient practice, however, seems to have been overruled by Richard de Luci, according to William de Ralegh's

[1] Roberti Grosseteste Epistolæ. Rolls' Edition p. 89.

statement, who cites in reply to the bishop a judgment of Richard de Luci's: "Quod bastardus sub pallio super "parentes nubentes extento positus surgit bastardus." Richard de Luci filled the office of Great Justiciar from 1154 to 1179, and it is probable that this judgment of Richard de Luci's was delivered shortly after the death of Archbishop Becket, A.D. 1170, and that it accounts for the decretal letter of Pope Alexander III., which was addressed to the Bishop of Exeter in 1172, and in which the Pope says that the effect of marriage is to legitimise all children born prior to it. "Tanta vis est matrimonii, "ut, qui antea sunt geniti, post matrimonium contrac-"tum legitimi habeantur." That Richard de Luci's judgment was held to be conclusive as to the law and custom of England, notwithstanding that the letter of Pope Alexander III. was followed up by a decree of the Lateran Council of 1179, may be gathered from the work attributed to Ranulf de Glanville, the successor of Richard de Luci, who writes thus: "Circa hæc au-"tem orta est quæstio, si quis, antequam pater matrem "suam desponsaverit, fuerit genitus vel natus, utrum "talis filius sit legittimus heres, cum postea matrem "desponsaverit. Et quidem licet secundum canones "et leges Romanas talis filius sit legittimus heres, "tamen secundum jus et consuetudinem regni nullo "modo tanquam heres in hereditate sustinetur, vel "hereditatem de jure regni petere potest."

It would also appear from a further passage in Glanville, that the practice in the king's court in his time was, when the objection of bastardy had been raised on the ground of the claimant having been born before the marriage of his parents, to send the question to the ecclesiastical court for its determination, and according to its decision to adjudge the inheritance to the claimant or to reject his claim. The change now made in the procedure under the Statute of Merton would seem to have been called for by an objection raised by

the bishops themselves to make a return, that the party was a bastard on the ground that it appeared that the marriage of his parents took place after his birth; and they requested the king and the magnates to consent that the children born before matrimony might be in all respects as legitimate as the children born after it. The magnates, however, refused to make this concession to the bishops, and although it cannot well be doubted that this portion of Bracton's work has not received from its author a final correction, it may, I think, be gathered from it that the king obtained on this occasion from the great council of the realm its consent, that the king might exercise the option of committing an inquest to the Ordinary, or of making the inquest in his own court, in cases where the exception taken against the claimant was that by the law and custom of England he was a bastard, inasmuch as he was born before the espousals and matrimony of his parents; and still further, that in cases where the inquest has been committed to the Ordinary, and the Ordinary has answered obscurely by reason of legitimacy according to the statutes of the church being diverse from legitimacy according to the laws and customs of England, the king's court should be at liberty to hold a further inquest, whether the claimant was born before or after the matrimony of his parents.

To what extent we are justified in believing that Bishop Grosseteste was correct in saying, that before the time of Richard de Luci the marriage law of England was identical with the civil law as regards the legitimation of ante-nuptial offspring, it is difficult to decide. Bishop Grosseteste was a very remarkable prelate. Canon Stubbs in his History of England describes him as the most learned, the most acute, the most holy man of his time, the most devoted to his spiritual work, the most trusted teacher and confidant of princes, and at the same time a most faithful servant of the Roman Church

(vol. ii. p. 325, library edition, 1880). He appears from his letters to William de Ralegh to have thrown himself heart and soul into the struggle to obtain a reversal of Richard de Luci's judgment. That there had been such a judgment seems to be admitted by William de Ralegh, and that it bore hard upon the humbler classes may be inferred from the conduct of Bishop Grosseteste, who was essentially a man of the people, who, according to Matthew Paris, Hist. Anglorum ii. p. 376, Rolls edition, declined on his election to the see of Lincoln to be presented to the king, and who took the side of Simon de Montfort against the Crown. But there are other reasons for believing that Bishop Grosseteste's account of the early English custom may have been correct. The custom was general amongst the Teutonic nations, who used the phrase (mantelkinden) mantlechildren, as descriptive of children legitimised by their parents at the time of their marriage. It was also general amongst the Franks, amongst whom the phrase "Mettre les enfants du marriage "sous le poesle," or "le paisle" (pallium) is stated in the Institutes Contumières of Antoine Loysel to be "la "manière de legitimiser les enfants nés avant le mariage."[1] At the same time mantlechildren were debarred under the German feudal law from succession to great fiefs.[2] Further that the barons were interested as a body in the rejection of the rule of the civil law cannot be doubted, for it undermined many portions of the feudal law, for instance, the system of escheats, of wardships, of dower, &c., whilst it favoured marriages of disparagement. But how are we to account for the Scotch nation adopting

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[1] Mettre un enfant sous le poèle, se dit en parlant d'un enfant né avant le mariage et sur lequel on étend la poèle à la cérémonie nuptiale, pour marquer qu'on le reconnait et qu'on le légitime à la face de l'Eglise. Dictionnaire National de Bescherelle ainé. Paris, 1862.

[2] Ch. F. Schorcht, die Unfahig Keit der Mantelkinde zur Lèhns folge, Jena, 1797. Heffter, Die Erbfolge der Mantelkinde. Berlin, 1836.

the rule of the canon law in this particular matter, which they have maintained till the present day, whilst the English barons stiffly rejected it[1]? Selden recounts an amusing story which he had read somewhere, that when John of Gaunt solemnised his marriage with dame Catherine Swynford in 20 R. II., and their antenuptial progeny were legitimised, the children who were intended to be legitimised were placed under a cloak or mantle extended over the heads of the parents in the Parliament House.

It was thought, however, necessary on that occasion to have the *antenati* legitimised in the first place by the pope, and their legitimation recognised in letters patent of the Crown, and subsequently ratified and confirmed by authority of Parliament. The text of these letters patent is recited by Sir Harris Nicolas in his Excerpta Historica, p. 152, and he likewise gives an account of the method whereby Henry IV., a son of John of Gaunt by a previous marriage, endeavoured after he came to the throne to bar any future claim on the part of the children of dame Catherine Swynford to the Crown, as heirs through their father.

Bracton in discussing the mode of trial where bastardy has been objected to the claimant of an inheritance, or where the claimant has impugned the title of the tenant on the ground of bastardy, says that a writ should go to the Ordinary of the place (ordinario loci) on the part of the king, if the Ordinary be within the

[1] Sir Thomas Craig in his Jus Feudale, which he dedicated to King James I., says that the feudal law at first rejected legitimation, but in Scotland the Church had sufficient influence to bring about a change by introducing the canon law. De Successionibus L. ii. Diegesis 13. I have not found any trace of "mantelkinden" in Scotland, but as the liberty of legitimation in Scotland exceeds that which was allowed by the canon law, it seems rather to have derived its origin from the Roman civil law. Novella constitutio Divi Justiniani, lxxxix.

realm under the power of the king. But if the Ordinary who ought to hold cognisance be beyond the realm and not under the power of the king, and he is not bound to obey unless he is willing, nor can he inquire unless it be committed to him, then the action of the claimant may abate on account of a default of proof (fol. 419). Bracton does not here state in what sense he uses the term *Ordinary of the place*, but he elsewhere in his treatise, *De Actione Dotis*, vol. iv., p. 499, states that Martin de Pateshull, on being consulted by Peter de la Roche, bishop of Winchester, answered that in whatever diocese the party making the exception had his domicile, there should be notice given to him by the Ordinary, that, if he wished, he should come to state anything against the marriage, according to what should appear to him to be expedient, on the day which the Ordinary should appoint beforehand. Bracton so far furnishes us with a key to interpret the proceedings in the Parliaments of 17 Edw. III. and 25 Edw. III. A difficulty seems to have arisen in 17 Edw. III. with respect to children born abroad of parents in the service of the king, and against whom bastardy was objected as having been born before matrimony was contracted between their parents, to what Ordinary the king's court should remit the case for the purpose of deciding at what time lawful matrimony was contracted between the parents. The Archbishop of Canterbury appears to have brought the question generally before the Parliament of 17 Edw. III., on which occasion it was resolved that there was no manner of doubt that the children of our lord the king wheresoever born, either within or beyond the sea, were entitled to the inheritance of their ancestors, but with regard to the children of others, it was the opinion of the aforesaid prelates and magnates, and of the lawyers there present, that by reason of diverse doubts and difficulties which might arise in *proving* that they were *true heirs* (ver-

rois heirs), if a dispute or impediment should be raised against their inheriting, it would be convenient to think much before any certain law should be ordained on this subject. That this matter had been previously recited in the presence of our lord the king, and the said prelates and magnates, and also the Commons, and by them unanimously accorded and agreed as above, that concerning the children of our lord the king there is no doubt or difficulty that they will be heirs in whatever part they may have been born, and as regards the right of other children it was accorded in this Parliament that they were also heritable, in whatever part they should be born in the service of the king.[1]

The question was left in this incomplete state for seven years, during which the continued prevalence of the plague prevented the assembly of a parliament. At last a parliament was assembled in 25 Edw. III., and a statute was passed which is generally entitled "De Natis "ultra Mare," and to which is prefixed in Ruffhead's edition of the statutes the heading "In what place bas- "tardy pleaded against him that is born out of the "realm shall be tried." It will be seen that this statute contains no new legislation (Novel Ley) until we come to the sixth section, which provides as follows: "(6.) And if it

[1] Q'il n'y ad nulle manère de doute que les enfants nr̃e Seigneur le Roi queu parte qu'ils soient neez, par deceà la mière ou par delà porteront l'eritage de lour auncestres, mais quant as enfantz des autres il est avis aś ditz prelatz et grauntz et as gentz di Lei illoeques presentz qe pur divers doutes et difficultees qui purront avenir de prover que tieux soient verrois heirs, si debatz ou empeschementz soient mys en lour heritages, il covendroit molt penser avant que certeyne Lei sur ce soit ordeignée. Si fu ceste matière autre foitz recitée en la presence nr̃e Seigneur le Roi et des ditz Prelatz et Grantz et aussint les Cōmunes et per eux touz uniement acordez et assentiez come desus, qe des enfantz de nr̃e Seigneur le Roi il n'y ad doute ou difficultée qu'ils ne seront enheritez, queu parte qu'ils soient neez. Et en droit des autres enfantz acordez est en ce Parlement qu'ils soient aussint enheritez, quen part q'ils soient neez en service le Roi. Rot. Parl. E. iii. p. 139.

" be alleged against any such born beyond the sea that " he is a bastard, in case where the bishop ought to have " cognisance of the bastardy, it shall be commanded to " the bishop of the place, where the demand is to certify " the king's court where the plea thereof hangeth, as of " old time has been used in case of bastardy alleged " against them which were born in England."[1] It is obvious that this provision affords a solution of the doubts which are referred to in 17 Edw. III. as to how the exception of bastardy should be dealt with if raised against a person born beyond the sea of parents in the service of the Crown, and how the difficulty should be surmounted in proving him to be a true heir, that is, legitimate.

We have spoken of this statute as containing no *Novel Ley* until we come to the last paragraph of it, by which we mean, in other words, that the provisions of the statute, prior to those of the last paragraph, would stand with the laws in force, and did not tend to change or alter any statute then in being. There was, however, introduced a proviso in the preceding paragraph by way of restriction upon the mothers of such as were born abroad, namely, that they should have passed the sea by the licence and wills of their husbands. Barrington in his observations on this statute remarks that this restriction had its origin most probably in an instance of this sort in a family of consequence. At all events it was a restriction hitherto unknown to the common law, and was very probably devised to prevent the recurrence of a scandal, of which the incidents are now forgotten.

The barons of England, however, do not appear to have objected to certain other provisions of the canon

[1] Et si alleggee soit contre nul tiel nee par dela qil est bastard, en cas ou Levesque doit avoir conissance de bastardie, soit maunde a Levesque du lieu laou la demande est de certifier la Court le Roi ou le ple est pende, si comme auncienement ad este usee en cas de bastardie alegge contre ceux, qui nasquirent en Engleterre.

law as to legitimacy being received in England, inasmuch as we find that the marriage law of England had been accommodated since Glanville's time to the ordinances of the church in respect of putative marriages. Thus Bracton in his treatise, De acquirendo rerum dominio, (fol. 63) vol. i., p. 499, says, as to who ought to be styled a legitimate heir, "But a legitimate heir and son is he," he says, "whom marriage demonstrates to be legitimate, "as, for instance, he who is born of a legitimate mar- "riage, or *he who in the face of the Church is reputed* "*legitimate*, although in truth there may not have been "a marriage, when both, as well the husband as the "wife, have been united in good faith, believing them- "selves to be coupled lawfully, when they are in truth "conjoined in consanguinity, or in affinity, or in some "other way, so that the marriage may not stand good, "or provided only one of them believes so." This was in accordance with the Decretal, ch. 2, 4, 17, which Bracton cites as supporting the law of England,[1] which was still further accommodated to the canon law, C. 3, § 1. X., 4, 3, in holding that the offspring of such a marriage were to be regarded as illegitimate, if both parents, whilst knowing that there was a legal impediment to their marriage, should, in spite of every interdict, presume to contract marriage in the face of the Church. Bracton seems to have had before him the text of the canon law, as he follows in this matter the Decretal verbatim.

Bracton makes us acquainted with a fraud upon justice, which ecclesiastical judges were accustomed to practice in his time with a view to elude a prohibition from the king's court, to wit, they would summon a party before them upon the declaration of a ground of

[1] Fleta l. 1, c. 14 follows Bracton, and cites the words of the Decretal, ch. 2, 4, 17.

action having been made by another party, without any writing, and would serve three monitions on the first day on the party summoned, and thereupon declare him forthwith to be contumacious for not appearing, and proceed at once to excommunicate him. After forty days the bishop would signify to the king that the party was persisting in his excommunication, and was contemning the keys of the church, and thereupon the bishop would sue out from the king a writ to seize the party. The object, where a fraud of this kind had been practised, would be for the most part to prevent the party excommunicated from successfully prosecuting a civil suit in the king's court, for an excommunicated person was interdicted from every legal act as a plaintiff, and the defendant would at once take an exception to the person of such a plaintiff on the ground that he was an excommunicated person. It appears from the writ which the king on such occasions was accustomed to send to the viscount (fol. 427), that according to the custom of England a party who was really guilty of contumacy towards a court of Christianity, and persevered in his contumacy for forty days, was liable to be imprisoned until he made competent satisfaction to God and to the Church (fol. 408 b.). But after such satisfaction had been made, the Ordinary was bound to release him, otherwise the king would set him free.

The Statute of 5 Elizabeth ch. 23 would thus appear to be in substance little more than the affirmation of the common law, for the writ which Bracton recites as directing the viscount to enforce justice according to the custom of England, by imprisoning the offender until satisfaction had been made by him to Holy Church for his contempt as well as the injury caused to her (fol. 427), vouches the common law as the warrant of the writ. Bracton further informs us that a party, who has once been committed by the viscount to prison for a contempt against an ecclesiastical court, can only be set free at the

mandate of the lord bishop, and after the bishop has certified that the party has satisfied the church, unless he should have been imprisoned on a false suggestion, in which case a writ may go forthwith to the viscount for his deliverance out of prison. This is one amongst the many instances in which the recitals in the king's writ are the best evidence of the common law; so likewise it is not unusual to find a special reference to the custom of the realm in writs which initiate proceedings in prohibition against a Court of Christianity. For instance, Bracton states, fol. 405, that no ecclesiastical judge can duly proceed to hold cognisance concerning legitimacy as regards an inheritance and succession to property unless a trial has been commenced in the king's court and the exception of bastardy has been there taken, and thus we find in the writ of prohibition, which may be sued out, in case that a Court of Christianity under plea of letters from the Pope should commence such an inquest without a mandate from the Crown, a special recital that to originate such a proceeding in the Court of Christianity is contrary to the custom of the realm. In order also that a sentence of excommunication should be enforced by the civil arrest of an excommunicated party it was incumbent that the sentence should issue under the authority of a bishop, and that the king's chancellor should receive a letter of request from the bishop or his official. The viscount was not at liberty to seize a party upon the mandate of judges delegate or of an archdeacon (fol. 427). The reason for this limitation is explained more fully in a passage in which Bracton treats of the mode in which the king has to proceed in a case in which the defendant is a clerical person, who has no lay fee by which he can be distrained, and who is privileged from personal arrest on the part of the king's officer (fol. 422 b.). In such a case the king can issue a mandate to the Ordinary of the place, who has a barony, as, for instance, to an archbishop or bishop within whose

diocese the party is residing or has an ecclesiastical benefice, requiring such Ordinary to cause such person to appear before him, and the king may exercise coercion against such Ordinary by means of his barony. In such a case, if the clerk has a lay fee, for instance, a prebend, through which he may be distrained, and he has refused on appearing before the Ordinary to find sureties, the king may issue a special precept to the bishop to distrain the party through his prebend, and if the bishop should fail to do so, the king may distrain the bishop himself through his barony. And here Bracton uses a favourite expression, speaking of the jurisdiction of the king and of the bishop, that the spiritual sword ought to aid the temporal sword. The bishop, however, may have a valid excuse for not producing the clerk, for he may say that he has no benefice in his diocese where he can be distrained, or he may say that although he has such a benefice he is a scholar, and is studying in the schools of Paris or elsewhere, and that he has meanwhile done all that he could by sequestrating his benefice, whereupon proceedings are to be superseded it seems until the clerk has returned, so that he may be apprehended and coerced.

That the king's justiciaries sometimes differed from one another in their exposition of the common law of England is evident from more than one instance cited by Bracton. Amongst the chief justiciaries Stephen de Segrave is mentioned, fol. 36, as differing from William de Ralegh on a question of petty serjeanty, and as differing from Martin de Pateshull upon a question of forfeiture in a case where a husband has been outlawed for felony, and his wife is an heiress in her own right. Stephen de Segrave was of opinion that the wife in such a case ought to forfeit her inheritance and should never be restored to it during the lifetime of her husband, but Martin de Pateshull held that the wife ought

not to be ejected on account of the act of her husband, neither during the life nor on the death of her husband (fol. 130 b). Bracton evidently holds to the opinion of Martin de Pateshull in this case, for he proceeds to state the reasons of Martin's judgment. "Martin," he says, "was accustomed to say that the wife ought not to be "ejected from her inheritance on account of her hus- "band's felony, unless she has been convicted of having "harboured her husband after his outlawry, or per- "chance if she has been from the commencement a "consenting party to the felony; but if not, she might "well supply her husband with necessaries, if he were "beyond the realm." The last case in which Bracton cites a judgment of Stephen de Segrave, which was at variance with the views of his brother justiciaries, is on the subject of the *Lex Angliæ*, or, to use a more modern phrase, on the subject of *tenancy by curtesy*, under which a husband having married an heiress or having received with his wife a marriage portion or some land by way of donation, and having had children by her, was entitled, if she predeceased him, to possess the land during his own lifetime, whether the children had survived their mother or not. About the case of a first husband there was no discrepancy of opinion amongst the king's justiciaries, but with respect to a second husband, who upon the death of his wife claimed to enjoy the land during his lifetime to the exclusion of her children by her first marriage, Stephen de Segrave held the practice to be unjust, and maintained that the law of England in this matter was ill understood and ill practised, for it ought to be understood of the first husband and his common heirs, and not of the second, especially when there were heirs apparent by the first husband. From Bracton's statement (fol. 438) it may be inferred that William de Ralegh did not accept Stephen de Segrave's view, but held that the second husband could retain all that accrued during

the lifetime of his wife, but everything which fell into her estate subsequently to her death appertained to her heirs. Such also seems to have been the law in Glanville's time: "Si vero secundum ceperit virum mulier " ipsa, idem judicium erit de secundo, quod dictum " est de primo, sive heredem reliquerit primus, sive " non." L. vii., cap. 18, § 4. Glanville, however, applies the principle only to land which had been granted to a woman as a marriage portion, subject to a service due to a chief lord, whereas Bracton applies it to a husband who has married a woman *habentem hereditatem, vel maritagium, vel aliquam terram ex causa donationis,* so that the principle involved in the so-called *Lex Angliæ* had received a more extensive application in Bracton's time. This principle, however, had apparently undergone considerable restriction, when Fleta was composed, as Fleta thus describes the Lex Angliæ: "Lex quidem " Angliæ est, ut si quis uxorem hæreditatem habentem " duxerit, vel aliam terram habuerit in feodo ratione " maritagii vel alia causa donationis, quod feodum " habeat et liberum tenementum, si liberos inter se " habuerint ex justis nuptiis procreatos, si ipsa præ- " moriatur remanebit viro terra mulieris tota vita ip- " sius viri, sive superstites fuerint liberi, sive mortui, " dum tamen sonum aut vocem emiserint aut clamorem " qui audiatur inter quatuor parietes, si hoc probetur " Lex tamen ista ad secundos viros nullo modo exten- " ditur, eo quod palam inhibetur per statutum." L. vi., ch. 55, § 4 and 5. Such seems to be the view which Fleta took of the operation of the statute of Westminster the Second, 13 Edw. I., De donis conditionalibus, whereby it was provided that where land was given in liberum maritagium, which sort of gift had an implied condition, that upon the death of the husband and wife without any heir begotten between them, "the land " should revert to the donor and his heirs, the second " husband of any such woman should not have any-

" thing from henceforth in the land so given condi-
" tionally, after the death of the wife, by the law of
" England, nor should the issue of the second husband
" and wife succeed in their inheritance ; but immediately
" after the death of the husband and wife, to whom
" the land was so given, it shall come to their issue,
" or return to the giver and his heir as aforesaid."
Britton also states as law in his time, that those who were not first husbands could not successfully claim to hold tenements by the law of England (par la Ley de Engleterre), l. ii., ch. xii., § 3. It will have been observed, that Bracton represents the Lex Angliæ as constituting the second husband equally as the first husband the usufructuary for his life of any land conveyed to the wife howsoever, whereas the statute De donis conditionalibus enabled land to be entailed on the offspring of the first marriage, so as to preclude the usufruct of the said land being claimed by a second husband; in other words, this statute withdrew such land from the operation of the so-called Lex Angliæ. I confess to having felt some embarrassment in dealing with a document which is printed in the Appendix to Ruffhead's edition of the Statutes, vol. ix., and which is also printed in the Revised Edition of the Statutes lately published by authority, and is there entitled, "A
" statute concerning tenants by the curtesy of Eng-
" land." This document has been allowed to take a place amongst the Statuta Incerti Temporis, but it appears that in Rastall's Collection of the Statutes, anno 1603, the following note is subjoined: "But this seemeth
" to be no statute, but only one man's opinion." As, however, it has been inserted in the Revised Edition of the Statutes after the Statutes of Edward II., the reader may be disposed to regard it as a stray statute of that period, the effect of which would have been to modify the earlier legislation of the preceding reign, more particularly the statute De donis conditionalibus.

It does not speak well for the antiquarian research of the editors of the Revised Statute Book that they should not have discovered that this so-called statute is neither more nor less than a verbatim extract from the seventh book of Glanville,[1] chapter 18, paragraphs 3 and 4, and that it contains a statement of the law of tenancy by curtesy as allowed in the reign of Henry II. It should be observed, however, that Glanville does not designate the law by the title of "Lex "Angliæ," nor have we any certain knowledge when that title came into use, unless it may be referred to the reign of Henry I., when according to the author of the Mirroir des Justices, "it was granted by the curtesy of "King Henry I., that all those who survived their "wives, and by whom their wives had conceived, should "possess the inheritance of their wives for ever."[2] We are not, however, disposed to regard this royal grant of Henry I., if it be correctly recorded, as the introduction of a novel law, but rather as the amendment or modification of an existing law. The Normans, for instance, recognised the principle of the husband becoming the tenant by curtesy of his wife's estate, but the husband was liable to forfeit it after her death, if he married a second time.[3] The Lex Angliæ on the contrary allowed the husband to marry a second time and to keep the

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[1] Glanville is little known and not sufficiently appreciated in its bearing on the early history of English law from the fact, that the English editions of the book are scarce and not attractive in form, being in duodecimo, without any index or table of contents. We have ourselves had to make use of a German edition published as an appendix to the Englische Reichs und Rechtsgeschichte von Dr. George Phillips. Berlin, 1828.

[2] "Grant fuit de la curtesie le "Roy Henry le primier, que touts "ceux qi survivissent lour femmes "dount elles ussent conceives "tenussent les heritages lour fem-"mes a touts jours." Ch. 1, Sect. III. Mirroir des Justices.

[3] L'Ancienne Coutume de Normandie par William Laurence de Gruchy. Jersey, 1881, ch. xxi., De Impeditione viri viduati.

guardianship of the children by his first marriage as well as the usufruct of their inheritance during his lifetime, and in this respect the Lex Angliæ followed the rule of the civil law as laid down in a constitution of the Emperor Leo A.D. 468. "Patres igitur usumfructum "maternarum rerum, etiam si ad secundas migrave- "rint nuptias, sine dubio habere debebunt, Cod. l. vi., "Tit. lix., § 4." If it is permissible to conjecture what may have been the origin of the tradition preserved in the Mirroir des Justices, we venture to suggest that King Henry I. may have modified the Norman law by engrafting on it the more liberal provision of the Roman law in respect of the husband enjoying for his life the usufruct of his first wife's property, notwithstanding he should marry a second time. On the other hand if we seek for light in the Barbaric Codes [1], they seem to have given to the husband who has married an heiress and has had offspring by her, a right of succession in full property to the inheritance of his wife, whereas the Lex Angliæ had a feudal element in it, from which it derived its name of "Curialitas Anglica." Sir James Craig [2] discusses the motive of the law, "Curialitas ob "reverentiam prioris matrimonii, quod quis cum uxore "hærede contraxerit, ne ea mortua ad egestatem "maritus reducatur. Angli Curialitatem Anglicam vo- "cant, quasi ea apud solos Anglos locum haberet, sed "falluntur, nam apud nos et Normannos huic curia- "litati locus est, imo ejus origo ex Jure Civili non "incommodo deduci potest, ex Constantini enim re- "scripto sancitum est, ut hæreditatis maternæ pater "usumfructum, filii proprietatem haberent, cum antea "libera permitteretur patri dispositio de omnibus eis "bonis, quæ per matrem ad liberos devenissent." We

[1] Lex Alemannorum Tit. xcii. (93), Corpus Juris Germanici Antiqui. Walter. Berolini, Tom. I., p. 228.

[2] Jus Feudale L. ii., ch. 19, § 4.

have here also a clue to the source of the law of the Alemanni, which was founded on the Code of the Western Empire as it existed before the legislation of Constantine. But neither the Theodosian Code nor the Code of Justiniam supply us with a clue to explain the origin of the term "curialitas." We must have recourse to the institutions of feudalism, if we would understand the meaning of the phrase "tenens per "curialitatem," or as it has been rendered in English, "tenant by curtesy." Curialis was a term borrowed from the Roman law, and inasmuch as "curia" was the feudal designation of the lord's court, so "curialis" was the designation of a member of it. It would appear that under the feudal law system it was one of the first duties of a husband who had married an heiress to attend fhe lord's court as the representative of his wife, and to do suit and service to the lord in respect of his wife's estate, and thus he came to be recognised as the tenant of that estate, and was designated as "tenens per curialitatem." How the term "curialitas" has come to be rendered by the English word "curtesy" belongs to another inquiry, which we do not propose to undertake, but the word "curialitas" is employed by Bracton in the present volume (p. 20). Thus Bracton in his treatise on warranty says of a person, whom the king ought to warrant "et ideo dicere poterit ille, cui rex warrantizare "debet, cum quædam curialitate, sic quod sine rege "respondere non poterit, &c." We have rendered the word "curialitas" in this passage by the English word "courtliness" to distinguish it from the "curtesy" of the feudal law, which contained an element of respect or reverence in its original meaning, which has been discarded in the ordinary use of the word in the present day. It may be worth while for the reader to compare what Bracton says in his treatise de acquirendo rerum dominio in the fourth paragraph of the seventh chapter, with the statute 13 Edw. I., De donis conditionalibus,

as Bracton's text foreshadows the legislation of Edw. I. whereby limitations might be set to the operation of the Lex Angliæ at the will of the donor of a maritage. (vol. i., p. 177.) Sir William Blackstone represents the introduction of tenancy by curtesy to be a consequence of feudal tenure. "For if," he says, "a woman seised of "lands hath issue by her husband, and dies, the hus- "band is the natural guardian of the child, and as such "is in reason entitled to the profits of the land in order "to maintain it, for which reason the heir apparent of "a tenant by the curtesy could not be in ward to the "lord of the fee, during the life of such tenant. As "soon, therefore, as any child was born the father "began to have a permanent interest in the lands, he "became one of the *pares curtis*, did homage to the lord, "and was called tenant by the *curtesy initiate*, and this "estate being once vested in him by the birth of the "child was not suffered to determine by the subsequent "death or coming of age of the infant." The author of the Commentaries of the Laws of England has, however, failed in the above passage to distinguish between doing fealty to a lord, and doing homage to him. It was a cardinal principle of the feudal law that homage should not be done for a tenement not held in fee, but an oath of fealty might be taken for it, and services might be done for it, without homage being exacted.

It has been observed by Selden in his Dissertatio ad Fletam, C. iii., that in many of the quotations, which Bracton has made from the digest of Justinian, there are errors, which are sometimes to be referred to the scribe of the MS. which has been followed by the printer, and sometimes to the compositor who has misread the MS. We have also remarked, vol iii., p. 174, note 1, that the misrecital of a passage on the Code or Digest may be atttributable in some places to the fact that Bracton had before him a text differing somewhat from the Florentine text of the Corpus Juris. There is however in the trea-

tise on Exceptions, ch. xiii., § 5., p. 236, an instance of a quotation from the Digest, the text of which is so corrupt, that we can only account for it by the supposition, which we have ventured to make elsewhere, that this treatise still awaited from the master's hand a final revision of the text, which for other reasons must be regarded as incomplete. In this particular instance Bracton cites the Roman procedure in a cause of adultery as furnishing a principle by analogy which should govern the procedure in a cause of prohibition, viz., that it does not follow, because the ecclesiastical judge has improperly allowed a party to institute a cause in his court, that the party so instituting the cause is to be punished, or if there be more than one judge and one has failed to purge himself, that the others ought to be thereby damnified so as to be prevented from defending themselves and their cause. The analogy set up by Bracton would seem to be rather strained. But by the Roman law as a simultaneous prosecution of an adulterer and of the married woman, with whom he was charged with committing adultery, was not permitted, the prosecutor had his option as to which he would first prosecute, or proceedings might be instituted against the parties separately by different prosecutors. Bracton accordingly cites the provision of the Lex Julia de Adulteriis, under which the man charged with adultery might be condemned before a careless judge on false evidence, whilst the woman being tried before a more scrupulous judge might be acquitted, and so he argues that the ecclesiastical judges might be condemned for contemning the king's letters of prohibition, without their condemnation prejudicing the defence of the party, who may have brought his case into their court. The passage as it stands in Tottell's text is not quite intelligible, but we have supplied in the note a text which is evidently that which Bracton intended to cite in support of his position, that the party who has brought his suit into an ecclesiastical

court ought not to be punished, because the judge has with knowledge entertained it improperly.

Another very singular reading occurs in Tottell's text in the course of Chapter xii. about the middle of the third section. The passage is as follows: "Item incipit tale "tenementum esse laicum feodum et non ante, quod "non erit de decimis, cum semel efficiantur esse laicum "feodum, nunquam reincipient esse decimæ, et hæc vera "sunt secundum Biastos f. 409 b." If it be assumed for the moment that the editor of Tottell's text has followed accurately the text of a particular MS. we are here introduced to a writer on a delicate point in the conflict of law between the ecclesiastical and the civil courts of the realm, whom Bracton seems to regard as of high authority, but whose name would have been lost to posterity, if it had not been preserved in this passage. We may be unreasonably sceptical as to the existence of any such writer as "Biastos," and from a comparison of the readings of various MSS. we are disposed to think that the reading of the MS. which Tottell's editor had before him was "secundum B. "et alios." Other MSS. present other readings. Thus MS. Rawl. C. 159 has "versus B. et alios," whilst MS. Reg. 9. E. xv. has "versus R. et alios." On the other hand the Glastonbury MS., which is No. 21,614 amongst the additional MSS. in the British Museum, has the reading "secundum regem et alios," which is also the reading of MS. Hobhouse, in Lincoln's Inn library. Fleta unfortunately afford us no assistance. None of the readings, however, which are for the most part rendered obscure by contractions, are altogether satisfactory, and after all we may be endeavouring to give life to a phantom in suggesting a possible explanation of a supposed reading "secundum B. et alios." Assuming, however that Bracton may have made such a reference, it would be an interesting fact, inasmuch as Azo, whom Bracton deservedly regarded as a master of high authority, frequently quotes passages from the Gloss writers denoting them simply by the letter B. meaning thereby Bul-

garus, who was one of the famous four doctors of the University of Bologna and perhaps the most illustrious of them, as may be inferred from his surname of "Os aureum." Bulgarus was a pupil of Irnerius, who founded the school of the Glossatores, and he as well as Martinus, another of the four doctors, are frequently cited by Azo, in his Summa on the Code, with which work Bracton has avowed himself to be familiar. We are indebted to Savigny for the further information, that Bulgarus in his glosses frequently cited the Decretum Gratiani, a remarkable fact, inasmuch as the Legists and the Canonists were already separated into two different schools, and that the glosses of Bulgarus are always signed with the initial letter B. in distinction from the glosses of other jurists, whilst the glosses of Martinus were distinguished by the letter M. Bulgarus died in 1166. That both Bulgarus and Martinus were quoted as authorities in the law school of the University of Oxford may be inferred from the glosses appended to the work of Magister Vacarius, which was composed by that eminent teacher of law for the use of the poor students at Oxford. At what precise period Vacarius composed his work "in "usum pauperiorum" cannot be laid down with certainty further than that it was subsequent to A.D. 1149, in which year according to the chronicle of Robertus de Monte Vacarius commenced his lectures in the University of Oxford. At the same time the fact that the Decretum Gratiani is frequently quoted in the glosses of Vacarius points to a period later than 1151 as the time, after which his work was completed. Vacarius is believed to have died in England at an advanced age. He is mentioned in a Decretal letter of Pope Alexander III. of the year 1164 as a commissioner to examine a question of marriage, and in another Decretal letter of 1170 he is mentioned as one of two canons of Canterbury Cathedral, who were in attendance on Archbishop Becket, so that it is not improbable that after the death of King Stephen in 1154, who had proscribed the professor's lectures at Oxford

Vacarius may have resumed them. On this hypothesis his work, which was entitled "liber ex universo enu- "cleato jure exceptus et pauperibus præsentim destina- "tus," may have been completed sometime after the Decretum Gratiani had been in circulation. However this may be, there is no doubt that the traditions of the teaching of Vacarius were still preserved in the law school of Oxford when Bracton himself frequented them, if he did not at one time himself assume the professor's hood which Vacarius had worn. It is thus possible that in the present passage, whilst drafting his treatise on Exceptions, Bracton may have noted down a reference to Bulgarus as an authority, that the tithes of crops after they had been severed and sold ceased to be a subject of ecclesiastical cognizance, and became chattels over which a lay court might properly exercise jurisdiction. Bracton in a passage a little further in Chapter xvi., p. 253, says that jurisdiction is sometimes changed from jurisdiction, thus, when things have been tithed, chattels become from lay things spiritual things, and so the secular jurisdiction is changed into a spiritual jurisdiction. Likewise conversely when tithes have been sold and transferred to another person, they recommence to be a lay chattel.

We now approach the end of Bracton's work, respecting which we have already said that it has evidently not been completed in accordance with the author's original design, inasmuch as he has promised (fol. 394 b.) to treat in a future chapter of trial by battle or by the Great Assise, which he has omitted to do, and which subjects would in due course have been discussed, after the chapter on Exceptions. We are not disposed to go so far as Mr. F. M. Nichols, in his introduction to his excellent edition of Britton, p. xlv., where he says that the three last chapters of the printed book of Bracton appear to be a fragment not connected with the matter immediately preceding. The thirty-third chapter, which is the last, is we think justly open to this observation.

But the thirty-first and thirty-second chapters seem rather to be of a supplemental character, each of them being connected by an introductory phrase with matter, if not immediately preceding, at least to be found in a preceding part of the fifth book. They have for instance reference to the subject of Defaults, and would properly be introduced prior to discussing the *litis contestatio*. The last chapter however upon mixed actions has but a very slight relation to the preceding chapters, and has as little logical connexion with them as the chapter " de officio judicis " at the end of the fourth book of the Institutes of Justinian has with the preceding portion of the Institutes. In fact the subject of mixed actions hasbeen discussed in its proper place in the third book of Bracton, of which the first treatise is entitled " De actionibus," and in which the subject of " actiones mixtæ " is treated of in Chapter iii., § 5. It may indeed be justly said, that the first paragraph of this last chapter of Bracton's work is but a repetition of what he has already more fully discussed in the chapter above referred to of his third book. It is, however, a singular coincidence that Bracton's work, as it has come down to us in the most complete MSS., should end with a chapter, which marks in an especial manner the influence of the Roman jurisprudence in developing the law of England, and in releasing it from the coils of feudalism in spite of the preponderating power of the Barons, who in many respects kept in check both the Crown and the clergy. The reader will carefully bear in mind that we make a clear distinction between the Roman jurisprudence and the Roman law. The Barons of England may have with reason declined to bend their necks to the yoke of a law, to which they were not consenting parties, but they could not with equal reason object to the judges of the Crown acquiring at the best sources a knowledge of what was just or unjust, that they might themselves award in the King's name justice to those, who sought

it at their hands "juris enim prudentia agnoscit, et "justitia tribuit cuique quod suum est."

Bearing in mind the contents of the two first books of Bracton's work and the Roman element of the last chapter of his last book, we need not be surprised that the learned M. Houard [1] in his well known Treatises on the Norman Customs published in England between the eleventh and the fourteenth centuries, has omitted Bracton's work from his collection, as being the work of a writer who had corrupted the law of England, but we may justly feel astonished after such a declaration on his part to find that M. Houard has admitted Fleta and Britton into his collection, the former treatise being little more than an abridgement of Bracton, whilst the latter has recoined, as it were, the most useful portions of Bracton, and where it differs from Bracton, departs even further from the feudal law-system then Bracton's own work. There is, it may be admitted, a principle more than once enunciated by Bracton under the form of the phrase "Conventio vincit legem," or as it has been Anglicised "covenant conquers law," which was calculated to sap the foundations of Feudal Tenure, and which was embodied in the legislation of King Edward I., whose most trusted advisers were lawyers. The English Justinian, as he has been termed, with the aid of his successive chancellors Robert Burnell and John Langton, and his successive chief justices Ralph de Hengham and Gilbert de Thornton, resolved to sanction by statutory enactments the larger liberty of donation in respect of land, which had been affirmed by the judgments of the king's justiciaries during the reign of his predecessor, and he further thought it wise to substitute the letter of written law for the flexible spirit of unwritten custom. Edward I. had in fact to secure by legal definitions the

[1] Houard (David), Traités sur les coutumes Anglio-Normandes, &c. 4 vols., 4to. Paris, 1776.

ground which had been won from feudalism by the king's justiciaries since the reign of Henry II. and to establish throughout the kingdom a symmetrical administration of justice between his subjects. There can be little doubt that the labours of Bracton must have facilitated very much the work of codification, which Edward I. initiated. It may be the fact that the legislation during the reign of Edward I. was dictated by motives of self interest on the part of the Crown, but it was founded on an enlightened view of the Crown's interest, and whilst his legislation tended to restrict the action of the manorial courts and even of the county courts, he improved both the law and the procedure of the king's courts, and secured to his subjects a regular and settled judicature, which more than compensated them for any increased expenses on the part of the suitor. We have already in the introduction to vol. v. explained the process of change, by which questions of proprietary right were gradually withdrawn from the cognisance of the manorial courts and came to be heard in the first instance in the county courts. On the other hand the jurisdiction of the county courts was in its turn limited by statute, and it was also competent for the claimant or the tenant in any plea of right to petition the Crown for a writ to transfer the cause from the court of the county to the king's court. It must not, however, be supposed that the improvement of the procedure of his inferior courts was neglected, whilst the procedure of the king's court underwent such great amendment. There are two treatises which are little known in the present day, but which are printed as an appendix to Lord Chancellor Fortescue's work De laudibus legum Angliæ. They are entitled respectively Hengham Magna and Hengham Parva, of which the former treatise, unfortunately only a fragment of a larger work, was composed after 54 H. III. (A.D. 1270). We may observe by the

way that Hengham Magna supplies us with a confirmation of the view, which we have expressed in the introduction to vol. v., p. lviii., that the so called Statute of Leap Year, which is contained in Liber Scacc. Westmon x., fol. 226, with a testimonium clause "Quarto die Junii "Anno regni nostri quinquagesimo quarto," was a royal writ addressed to the king's justiciaries. It is cited p. 18, "Teste consilio domini Henrici Regis ac brevi suo "inde directo justitiariis suis de Banco anno regni "regis Henrici," l. iiii., and probably led to the appointment of its author, Ralph de Hengham, to the office of Chief Justice of England in the first year of the reign of Edw. I., when he had only attained his thirtieth year. We have alluded in the introduction to vol. iv., p. xxxiii., to the circumstances, under which Ralph de Hengham was deprived of his office of Chief Justice of England. If his offence was simply that of having altered a record of his court whereby a poor defendant was ordered to pay a fine of 6*s.* 8*d.* instead of 13*s.* 4*d.*, we can understand his deposition from his office to have been an excusable act of severity in a reign in which it was thought to be of the highest moment to enforce a strict respect for the letter of the law, although its disregard might not have been prompted by any corrupt motive. Such we conceive to be the explanation of the deposition of the Chief Justice, if he was not sacrificed to popular clamour or to political intrigue, for on no other explanation can we account for his restoration to the king's favour, and his re-elevation to the office of Justice Itinerant, and ultimately to the office of Chief Justice of the Common Pleas in 29 Edw. I., which office he continued to hold in the reign of Edward II. That Ralph de Hengham had been brought up at the feet of judges of the same school of law as Bracton may be inferred from the fact, that acccording to the print of his work he quotes on three occasions the opinion and on one occasion

a judgment of Henricus de Bathonia, with whom Bracton was associated as a Justice Itinerant on several assises.

Selden, however, seems to think that on three of these occasions he has quoted passages from the work of Henricus de Bracton himself, a suggestion which may be well founded, if it should happen that in the original manuscript the name of the justiciary in question was written in a contracted form. Selden had several MSS. of Hengham Magna before him, and he found various readings in them, some of which were evidently interpolations by a hand more recent than Hengham's. This suggestion of Selden's gives rise to another question, namely, at what time the Latin Summa of Bracton was recognised as his work. We use the term Summa, as it is under that modest title that Bracton describes his work, no doubt after the example of Azo, whose "Summa" he quotes under that name. Ralph de Hengham also entitles his first work "Summa Magna." His second work, "Summa Parva," is a work of minor importance, and was composed after the Statute of Westminster the Third (18 Edw. I.). It is remarkable from its mode of citing authorities, as instead of citing judgments of the king's justiciaries, as Bracton does, it cites on all occasions statutes of the king's reign, as if it were intended to familiarize the reader with the statutory modifications, which the Common Law had recently undergone. If Selden's conjecture should be well founded, Ralph de Hengham's Summa Magna contains an earlier recognition of Bracton's authorship than the letter, which preserves the history of the loan of his work having been made by the Lord Chancellor Burnell to the Archdeacon R. de Scardeburgh on Candlemas Day (2nd Feb.) 1277. The archdeacon's letter of acknowledgment styles it "librum quem dominus Henricus "de Breton composuit." It would thus appear that the mode of writing the name of the author, which in

the legal records of the reign of Henry III. is spelt Bracton or Bratton, was in the early years of Edward the First's reign giving way to the softer form of Breton, which the Lord Chancellor Burnell, who was more familiar with the French tongue than with the dialect of the West of England, seems to have countenanced, if he did not introduce it. It is by no means improbable that the French treatise, known in the present day as Britton, was drawn up under the eye of the Lord Chancellor Burnell himself by one of the clerks employed in the legal service of the Crown, and that it was originally entitled "Brettoun" or "Bretoun," with the accent on the last syllable, for so the name is spelt in two of the most ancient MSS.[1] to which a title is either prefixed or appended in the French language. On the other hand Gilbert de Thornton, of whom little is known, except that he succeeded to the place of Chief Justice of England after the deposition of Ralph de Hengham in 1289, and that he outlived Lord Chancellor Burnell, appears to have made or caused to be made after the Lord Chancellor's death a Latin abridgment of Bracton's work, to which Selden vouches that he saw prefixed the title "Summa de legibus et consuetudinibus Angliæ a "magistro Henrico de Bryctona composita tempore "regis Henrici filii regis Johannis." It was no doubt after Thornton's example that the numerous Latin abridgments of the original work of Bracton have been made, some of which observe the arrangement of the treatises which Tottell has followed, and which we are disposed to think was the earliest arrangement of his work, whilst others are divided into *capitula*, of which the Ashburnham MS. may be taken as a striking instance, or into *centuriæ*, of which we have an example

[1] Cambridge University MS., Gg. V. 12, and Harleian MS. No. 324 in the British Museum.

[2] Now in the British Museum.

in the Fletewood MS. in the Bodleian Library, Oxford. That there is no MS. now in existence which can claim to be in the handwriting of Bracton himself hardly requires to be asserted, for we now know that Bracton was dead in 1268, whilst there is good reason to believe that he ceased to write after 1258, when he was required to return to the Archives of the Exchequer the Rolls of Martinus de Pateshell, and Willielmus de Radleye. We may here take notice of a correction which we have been enabled to make in the text of Tottell's edition (fol. 419), where he cites a certain judgment as delivered by William de Ralegh in a Nottingham Iter, in 30 Henry III. (A.D. 1246). It was difficult at first sight not to suppose that there had been here either an error on the part of the printer of Tottell's edition or an error on the part of the scribe of the MS. which Tottell's editor has followed, inasmuch as William de Ralegh ceased to act as a justiciary of the Crown after his consecration to the see of Norwich in 1239. Still further, after his subsequent election to the see of Winchester in succession to Peter de Roches, in 1243, William de Ralegh was most obnoxious to the Crown, and died abroad in 1250, having failed to regain the favour of the king, who had destined the bishopric of Winchester for William de Valence, the uncle of Queen Eleanor. Two of the best manuscripts, which we have consulted, namely, MS. Rawl. C. 159, in the Bodleian Library, and MS. Reg. 9 E. XV., in the British Museum, agree in the reading "ut de itinere R. de Turkeby, (or "R. de Thurkeby,) anno regni regis xxix. in comitatu "Nottingh." (fol. 419.) Roger de Thurkelby is evidently the proper reading in this place. He was an eminent judge, and held circuits in 28, 29, and 30 Edw. I., and he is the only one of the king's justiciaries, with the exception of Henricus de Bathonia already alluded to, whose name is mentioned by Chief Justice Hengham in his Summa Magna (p. 72).

We have alluded to the Ashburnham and Fletewood MSS. as exceptional MSS. as regards the arrangement of their contents. The Fletewood MS. has already been described in the Introduction to Vol. I. We have recently had an opportunity of inspecting the Ashburnham MS., which was formerly in the Stowe Collection, and is described in O'Connor's Catalogue of the MSS. at Stowe under No. 722 as differing considerably from the print of Bracton. It is a folio of 202 leaves, measuring $13\frac{1}{4} \times 8\frac{1}{2}$ inches, written on parchment in double columns in a court hand of the latter part of the 13th century, with a table of contents prefixed to it. Some leaves of the MS. are deficient, and the text ends with the words, "sed habebit alium diem per "spacium xv. dierum ad minus ad capiendum ciro- "graphum suum, ut infra totum illud tempus possit, "qui jus —." On referring to the text of the present volume, p. 444, it will be found that these words occur near the end of Chapter xxix., § 1, and that the addition of the words "habuerit, apponere clameum suum," as in Tottell's text, completes the sense of the interrupted paragraph. The table of contents is apparently in the same handwriting as the text, commencing with the title, "Capitula de eo quod dicitur que sunt regi "necessaria." This table of contents is divided into seventy sets of capitula, each set being again subdivided into paragraphs. There have also been introduced in red ink at the top of each page of the text Roman numerals, which divide the work into xvi. books, of which division, however, no notice is taken in the table of contents, and it may be presumed that this division into books has been made by a later hand. The sixteenth book, which corresponds with the seventieth capitulum, commences with the subject of Exceptions, and according to the table of the contents of the capitula must have contained sixty paragraphs, but it breaks off, as already stated, near the end of the forty-second

paragraph, which is headed, "De exceptione que com-
" petit tenenti ex taciturnitate ipsius petentis vel ali-
" cujus antecessorum suorum." This heading is some-
what fuller than the heading of the corresponding paragraph of the print of Bracton, viz., "Exceptio ex
" taciturnitate, quod clameum non apposuerit."

The conclusion to which an examination of the various MSS. seems to point is that they may be classed under three general heads:—(1.) MSS. of which the text follows the division into books and the arrangement of the subjects adopted in Tottell's print of Bracton. (2.) MSS. of which the text is abridged, but in other respects follows the order adopted in the print. (3.) MSS. in which the writer has adopted an independent arrangement of the subjects, although he has kept in view Bracton's treatment of them. We are also disposed to think that there is internal evidence in the text of the print, that the arrangement of the subjects, as there adopted, was contemplated by the writer of the work. The fact, which we have contributed to bring to light, that Henricus de Bracton died in the autumn of 1268, enables us to reject with confidence certain interpolations in the text, as, for instance, the interpolation in the writ of mortdancester, fol. 253 b, which refers to an alteration made in the writ in the reign of Edward I., and could not have been made by Bracton's hand. On the other hand, the same fact is not equally conclusive against other interpolations, as, for instance, the case of Peter of Savoy, fol. 159, cited in the print of Bracton as having been heard before the king at Westminster in the Exchequer in 46 H. III., but which does not appear in several of the earliest MSS. We have already mentioned the circumstance of Bracton having been required to send back to the archives of the Exchequer the Rolls of Martinus de Pateshell and Willielmus de Radleye in 1258, and that he probably on that account and for other reasons discontinued his work in that year, other-

wise it is difficult to account for his silence as to the alteration made in the law as to homicide *per infortunium* by a statute of 43 H. III. (1259), to which he makes no allusion in fol. 135, where he states that in certain parts of the realm it was customary to punish homicide per infortunium as murder, which he considered not to be just, and which in fact was subsequently forbidden by the statute above mentioned. This is more especially deserving of note, inasmuch as the statute of 1259 was subsequently published in a Close Roll of 1260 and in a Patent Roll of 1262, and its provisions were re-enacted in the Statute of Marlbridge (1267), when Henricus de Bracton was discharging the duties of a justice itinerant. No notice has been taken by Bracton of this important alteration in the law, which is noted, however, in the later text of Britton (L. i. ch. vii.).

A volume of the Year Books of the reign of king Edward III. (years xi. and xii.) has very recently been issued, being the last of the works undertaken by the late Mr. Alfred J. Horwood, as part of the Rolls series, which he did not however live to complete, and which has been carried through the press by Mr. Luke Owen Pike, of Lincoln's Inn. Mr. Pike, in his preface, has noted several cases illustrating the changes which had been worked in the English law of marriage since the time of Bracton, more particularly as regards the rule of the canon law that divorce for consanguinity or affinity was not allowed to bastardize the issue of the marriage born prior to the divorce. This rule, which was recognised by the king's courts in Bracton's time, seems to have been first undermined by judicial decisions in the reign of Edward III., and to have been finally overthrown by a judgment in the reign of Edward IV. (Year Book, Hil. 18 Edw. IV., No. 28). Littleton, amongst others on that occasion, doubts, but he inclines to the opinion that where there had been a divorce for consanguinity the issue was bastard, but although he

had doubts in the matter, his great commentator, Lord Coke (Coke upon Littleton, 235 a.), seems to have forgotten that the earlier lawyers accepted the canon law on the subject as the law of the land. Mr. Pike has noted two other cases, which illustrate the collateral effects of the statute of Merton, A.D. 1236, as regards the bastardy of children born prior to the marriage of their parents, namely, that the king's courts ceased to refer such cases to the court of the ordinary for its determination whether the offspring was bastard or legitimate, and that the king's courts thenceforward exercised exclusive jurisdiction in such matters, inasmuch as the question involved in the inquiry was to be decided in conformity with the law and custom of England, and not in pursuance of the canon law. Mr. Pike, in accordance with the prevalent notion on the subject, considers that the bishops of England attempted at the council of Merton to introduce into England for the first time the canon or civil law on the subject of the legitimation of offspring by the subsequent marriage of their parents. The Editor, however, has ventured to suggest a more reasonable explanation of their conduct, namely, that they were endeavouring to restore a condition of things, which had been the law of England in the reign of Henry II., and had been superseded by a judgment of Richard de Luci, the Great Justiciar (supra, p. xxxiv.), and that upon the refusal of the magnates to entertain their proposal, the bishops resolved to abandon their jurisdiction in such cases, rather than to make a return to the king's writ, which would be inconsistent with the rule of the canon law, confirmed as it had recently been by a decretal letter of pope Alexander III. addressed to the bishop of Exeter.

The Editor has to thank Dr. W. H. Stevenson, the author of "The Records of the Borough of Nottingham," for calling his attention to two facts, namely, that the custom of the borough of Nottingham confirms his

remark that the liberty of bequeathing their tenements by will was enjoyed generally by the burgesses of our ancient boroughs; and, secondly, that the Scandinavian law-system furnishes us with a clue to explain the mysterious "sachabor," or "sakaber," of Bracton, which occurs in vol. ii., pp. 510, 540 (fol. 150 b., 154 b.). Neither Britton, l. 1, ch. xvi., who renders into French the word as "sakebere," nor Fleta, l. i., ch. 38, who renders it into Latin as "sacborgh," nor the Year Book of 30 and 31 Edw. I., Appendix II., p. 545, which exhibits "sacrabare," throw any real light upon the origin of the word or upon its true meaning, and the Year Book is an instance how rapid had been the corruption of the word after the lawyers had lost touch of its original sense. The Editor has already, in a note to vol. ii., p. 511, called attention to Grimm's interpretation of the old German word "sachibaro," which was used to denote a kind of local legal assessor, whose business it was to advise the unlearned members of the court, and has observed that Bracton employs the word "sacha-" bor" in quite another sense. Dr. Johannes C. H. R. Steenstrup, in the fourth volume of his valuable work on the Laws of the Northmen, published in Copenhagen in 1882, gives us reason to believe that we are to look to the Scandinavian codes for an explanation of the word in the sense in which Bracton uses it in the above passages. In the Norse Icelandic law-language a plaintiff in a suit is said "bera sakar á einum,"[1] and the plaintiff is called "sakarabéri." Dr. Steenstrup quotes passages from various *Sagas* in illustration of this use of the word "sakarabéri," and observes that we have evidently in the word "sakarabéri" not merely a word

[1] Cf. Cleasby and Wigfusson's Icelandic Dictionary. In Danish "sog" has still the meaning of an action or a suit. In Icelandic "sakar" is the genitiv of "sok," and "sakaráberi" means literally the bearer of a suit.

that resembles the English term "sakaber," or "sacha-
" bor," as used by Bracton, but a word that fulfills the meaning assigned to it by him, namely, a prosecutor to whom the thing stolen had belonged, "et insecutus
" fuerit per aliquem, cujus res illa fuerit, qui dicitur
" sachaber," fol. 150 b. Dr. Steenstrup is disposed to think that the same word may also be traced in the Scotch law, "Quoniam attachiamenta sunt principia et
" origo placitorum de wrang et unlaw, que prosecuta
" sunt per *sacreborg*, ideo de attachiamentis est incho-
" andum." Acta Parliament, I. 283, Record Commission. The identity of *sacreborg* with the "sachabor" of Bracton is also suggested by an ancient fragment of Scotch law edited by the same Commission, p. 379, which under the head of "De Foro ubi aliquis atta-
" chiatus est," provides "Quod ubi aliquis attachiatus
" est *per sectam partis* et debitum fuerit contractum
" sive commissum, ibi debet pati judicium."

The Editor has also to thank Mr. A. S. Wait, of Newport, New Hampshire, in the United States, for calling his attention to an inadvertence on his part in the rendering into English of a passage in Bracton's treatise "De acquirendo rerum dominio," where Tottell's edition (Lib. II., c. ii., § 4) exhibits the text, "E
" contrario autem, si quis de suo in alieno solo ædifi-
" caverit malâ fide, materiam præsumitur donasse, si
" autem bonâ fide, solvat dominus soli precium ma-
" teriæ et mercedem fabricatorum." The Editor has by inadvertence translated the latter portion of the sentence as if it had been written "solvat domino
" soli precium materiæ et mercedem fabricatorum.' The correction of the translation is fortunately obvious, but the sense of the translation when so corrected is not equally obvious, for there can be little doubt, as already intimated by a side-note, that Bracton had before him on this occasion the text of the "Summa of Azo," which he quotes by its title in the next following paragraph.

On referring then to Azo, p. 1066, § 39, it seems probable that an entire line has dropped out of Bracton's text. Azo writes thus: "Et e contrario, qui ædificat in alieno "solo de sua materia, siquidem malâ fide, præsumitur "donasse, licet M. distinxerit an habuit animum donandi "an non. Si vero bonâ fide, *habet doli exceptionem*, "*nec aliter tenetur restituere, nisi* dominus soli precium "materiæ solvat et mercedes fabrorum." The corresponding passage in the Institutes of Justinian, l. ii., tit. 1., § 30, enters into more detail, and supposes that the builder of a house is in possession of the ground, and has built his house upon it in good faith, believing the ground to be his own, whilst the rightful owner of the ground has looked on in silence until the house has been completed, and then has made a claim to the ground and the house upon it. The passage in Azo in which he cites a distinction made by Martinus, one of the famous four doctors of the University of Bologna, simply denoting him by the capital letter M, illustrates what has been already stated, p. lv., with regard to Bulgarus, another of the famous four doctors, that it was customary for civilians to cite the Glosses of Martinus and of Bulgarus, simply under the initial letters M. and B.

The Editor has once more to express his great obligations to Mr. E. Maunde Thompson, the keeper of the manuscripts in the British Museum, for his courteous assistance on all occasions in facilitating his collation of the MSS. of Bracton in the British Museum, more particularly when it was necessary to compare certain contractions in them with the corresponding contractions in the Bodleian MSS. It is not too much to say that in some of these instances the scribes themselves of the MSS. have most probably been themselves perplexed as to the meaning of what they had to copy. The Editor has also to repeat his thanks to Mr. William Hardy, the Deputy Keeper of the Public

Records, who has from time to time allowed searches to be made in various Rolls in the hope of finding evidence to confirm Bracton's references. The result, however, has been to show that Bracton is our sole authority in some cases for a judgment of the king's court, and in others for an ordinance of the king's council. Lastly, the Editor has to record his grateful appreciation of the liberality of the Curators of the Bodleian Library in the University of Oxford, who have permitted him to have the uninterrupted use of three of the MSS. of that Library, one of which, written in a curial hand, has been of the greatest service to him, whilst the other two have also been highly useful as representative manuscripts. One of these latter MSS. is written in a monastic hand, having formerly belonged to St. Augustine's Monastery, Canterbury, and being, perhaps, the most ancient of the three. On the other hand, the third MS. exhibits the name of Bracton both at the commencement and in the text of the first chapter, whilst, although it maintains the division of the original work into five books, it is evidently an abridgment in many places of the text.

In conclusion the Editor hopes that he may have contributed to dispel some of the obscurity in which the career of Bracton was involved at the time when Lord Chancellor Campbell composed his Lives of the Lord Chief Justices of England. No higher panegyric can well be pronounced upon the Great Justiciary than what is expressed in the eloquent language of the Lord Chancellor, which has been set forth at length in the Introduction to Vol. II., p. lxxiv. A portion of his encomium may here be fitly repeated, as it confirms the view which the Editor has from time to time suggested. "Whilst "we have," he says, "a minute account of the military "exploits of those who were employed in desolating the "world, we have no information whatever of the origin, "and very little of the career, of a man, who explained

" to his savage countrymen the benefits to be derived
" from an equitable system of laws defining and protect-
" ing the rights of every class of the community,—who,
" drawing his sentiments from the rich fountain of the
" Roman Jurisprudence, expressed them in the Latin
" tongue with a purity seldom reached by the imitators
" of the Augustan age, and who was rivalled by no
" juridical writer till Blackstone arose five centuries
" later."

The Temple, 1883. TRAVERS TWISS.

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HENRICI DE BRACTON

DE

LEGIBUS ET CONSUETUDINIBUS ANGLIÆ.

HENRICUS DE BRACTON

ON THE

LAWS AND CUSTOMS OF ENGLAND.

R 2657. Wt. 5265. A

HENRICI DE BRACTON

DE

LEGIBUS ET CONSUETUDINIBUS ANGLIÆ,

TRACTATUS QUARTUS LIBRI QUINTI,

IN QUO TRACTATUR DE WARRANTIA.

f. 380.

Cap. I.

1. De warranto vocato post visum. Britton vi. ch. iv. § 12.

Cum autem tutius sit warrantum vocari[1] tenenti, quàm in propria persona subire defensionem, cûm ex persona sua propria ad actionem omnino elidendam, vel ad tempus differendam non competit ei exceptio peremptoria vel dilatoria, tunc si warrantum habuerit, illum statim vocet, aliquando per auxiliū curiæ, aliquādo sine, secundum quod warrantus fuerit sub potes-

f. 380 b.

tate vocantis, & ita q illū sine auxilio habere possit, vel secundum q fuerit sub alterius potestate q illum sine auxilio ꝓducere nō possit. Sub alterius potestate dico, sicut sub potestate dñi regis, sive in regno Angliæ, sive in Hibernia, sive in Wallia, in aliqua ꝑte quæ sit sub potestate & dominico dñi regis. Si autē fuerit qui vocatus est extra potestatē dñi regis, in vanum vocabitur per auxilium, quia tunc necesse habet habet tenens illum ꝓducere per se, si possit, alioquin amittet.

[1] "vocare," MS. Rawl. C. 160.

THE FIFTH BOOK

OF

HENRICUS DE BRACTON

ON THE

LAWS AND CUSTOMS OF ENGLAND,

THE FOURTH TREATISE,

WHICH TREATS OF WARRANTY.

Chapter I.

f. 380.

1. Of calling a warrantor after a view.

Since, however, it is safer for a tenant to vouch a warrantor than to undertake a defence in his own person, when he is not competent in his own person to raise a peremptory or a dilatory exception with a view to parry the action altogether or to defer it for a time, then if he has a warrantor, let him vouch him forthwith, sometimes with the help of the court, sometimes without it, according as the warrantor may be under the power of the person vouching him, and so that he can f. 380 b. produce him without help, or according as he may be under the power of another person so that he cannot produce him without help. I mean under the power of another person, as for instance under the power of the lord the king, either in the realm of England or in Ireland, or in Wales, in some part which is under the power and within the domain of the lord the king. But if he, who has been vouched, is beyond the power of the lord the king, he will be vouched in vain with the help [of the court], because then the tenant is under the necessity to produce him through his own means, if he can, otherwise he will lose.

2. Quid sit warrantizatio.

Inprimis videndum erit quid sit warrantizatio. Et sciendū quòd warrantizare, nihil aliud est, quâm defendere, & acquietare tenentē, qui warrantū vocavit, in seysina sua, quia quamvis warrātus warrantizaverit, non tamen ꝑpter hoc transfertur seysina ad warrantū, nec aliquid aliud nisi defensio rei petitæ, q̃ quidem defensio, cûm semel ad warrantum translata fuerit, postmodum resumi non poterit à tenente, sed omnia ꝑcedent sub nomine warranti, nec cùm warrantus warrantizaverit, rem warrantizatā reddere potest petenti contra voluntatē tenentis, vel sine juditio, quia defendere non est reddere sine voluntate tenentis, quin ei fiat disseysina. Sed cùm voluntas tenentis vel judiciū intervenerit, tunc statim & non ante transfertur seysina rei petitæ ad petentem, & tenens de re warranti excambium habeat ad valentiam.

3. Quis possit warrantum vocare et de qua causa.

Videndum etiam quis posset[1] warrantum vocare, et qua de causa. Et sciendū, q warrantū vocare poterit omnis qui non prohibetur, sicut ille qui rem aliquam corporalem habuerit, sicut terram, et tenemētū ab aliquo ex quocunque justo titulo vel justa causa acquirendi, sicut ex causa donationis vel vēditionis vel ꝑmutationis et hm̃oi, cum charta de warrantia expressa & homagio aliquando, nisi in eadē charta exprimatur, q nō obstante homagio si donator ad warrantū vocat[2] fuerit nō teneat ad warrantiā, nec ad excābiū, et sic vincit conventio legē.

4. Quare debeat warrantizare.

Itē tenet quis warrantizare quandoq̃ ꝑpter homagiū, etiam sine charta, & sive sit major sive minor, dum tamen ante ætatē minor qui vocatus fuerit nō respon-

[1] "possit," MSS. Rawl. C. 159 et 160.

2. What is warranting.

We must see in the first place what is warranting. And it is to be known that to warrant is nothing else than to defend and to acquit in his seysine a tenant, who has vouched a warrantor, because although the warrantor has warranted, the seysine is not on that account transferred to the warrantor, nor anything else except the defence of the thing claimed, which defence indeed, when once it has been transferred to the warrantor, cannot be afterwards resumed by the tenant, but all things shall proceed under the name of the warrantor; nor when the warrantor shall have warranted, can he restore the thing warranted to the claimant, against the will of the tenant, or without a judgment, because to defend is not to restore without the assent of the tenant, so as not to cause to him a disseysine. But when the assent of the tenant or a judgment has intervened, then forthwith and not before the seysine of the thing claimed is transferred to the claimant, and let the tenant have an equivalent in compensation from the estate of the warrantor.

3. Who can vouch a warrantor and on what grounds.

We must see, who can call a warrantor and on what grounds. And it is known that every person who is not prohibited may call a warrantor, as for instance he who has received any corporeal thing, as land for instance, or a tenement from any person upon any just title whatsoever or upon any just grounds of acquiring it, as on the ground of donation or of sale or of exchange or such like, with an express charter of warranty and sometimes of homage, except it be expressed in the same charter that notwithstanding homage, if the donor be vouched to warrant, he is not bound to a warranty, nor to make compensation, and so a convention controls the law.

4. Who ought to warrant.

Likewise a person is bound to warrant sometimes on account of homage, even without a charter, and whether he be of full age or a minor, provided that if a minor

deat ad warrantiā. Et idem dici poterit de juribus, sicut de custodiis & maritagiis & hujusmodi. De hoc autē quod dicitur omnis qui non ꝑhibetur, quia non potest quis warrantū vocare in pœnali actione, ubi quis convincendus fuerit ex delicto, vel injuria ꝑpria, & ubi fuerit pœna corporalis infligenda, cùm pœna suos tenere debeat actores, & non alios.

5. Quis vocari debet ad warranti-zandum.

Itē videndū est, quis vocari possit ad warrantū? Et sciendum quòd tam masculus quàm fœmina, tam minor quàm major, dum tamen (ut prædictū est) si minor vocetur remaneat placitum de warrantia in suspēso usque ad ætatem, nisi causa fuerit ita favorabilis, quòd ætas expectari non debeat, sicut ex causa dotis. Item non solum vocandus est ad warrantū ille qui dedit vel vendidit, verum etiam vocandi sunt eorum hæredes descendentes in infinitum, propter verba in chartis contenta. Ego & hæredes mei warrantizabimus tali & hæredibus suis &c. Et in quo casu, tenentur hæredes warrātizare, sive sint ꝑpinqui sive remoti, remotiores vel remotissimi. Et q̄ de hæredibus dicitur, idem dici poterit de assignatis, & de illis qui sunt loco illorum hæredum,[1] sicut sunt capitales domini qui tenentibus suis quasi succedunt, vel ꝑpter aliquem defectum, vel ꝑpter aliquod delictum, sicut de eschaetis dominorum. Et q̄ assignatis fieri debet warrantia per modum donationis: ꝑbatur in itinere W. de Ralegh in coñ Warr̄ circa finem rotuli, et hoc maximè, si primus dominus capitalis, & primus feoffator, ceperit homagium & servitium assignati.

Fleta l. vi. c. 21 § 6.

f. 381.

6. Si minor vocatus

Si autē minor fuerit vocatus ad warrantū de aliqua libertate, sive per se, sive cum aliis, semper inquiratur

[1] "loco hæredum," MS. Rawl. C. 160.

be called, he need not answer the warranty before he is of full age. And the same may be said of rights, as of wardships and maritages, and such like. But concerning this which is said "every person who is not prohibited," because a person cannot vouch a warrantor in a penal action, where a person will have to be convicted of a misdemeanor or of injury of his own doing, and where corporeal punishment will have to be inflicted, since punishment ought to attach to the real actors, and not to others.

5. Who ought to be called to warrant.

Likewise we must see who can be vouched to warrant. And it is to be known that a male as well as a female, a minor as well as a person of full age, provided, however (as aforesaid) if a minor be vouched, the plea concerning the warranty must remain in suspense until he is of full age, unless the cause should be so favourable that his full age ought not to be awaited, as in a cause of dower. Likewise not only he who has given or sold a thing is to be vouched to warrant, but likewise their heirs descending in perpetuity by reason of the words contained in the charters; "I and my heirs will warrant to so-and-so and his heirs &c.," and in which case the heirs are bound to warrant whether they be near or remote, more remote or most remote; and what is said concerning heirs, may likewise be said concerning assigns, and concerning those persons who are in the place of heirs, as for instance, chief lords who succeed as it were to their tenants, either on account of any default on their part, or on account of any delict, as by reason of an escheat to the lord. And that a warranty by means of a donation ought to be made to assignees is proved in an iter of William de Ralegh in the county of Warwick near the end of the roll, and this more especially, if the first chief lord and first feoffor has received the homage and service of the assignee.

f. 381.

6. If a minor be vouched

But if a minor be vouched to a warranty concerning some franchise, whether by himself or with others, let

fuerit ad warrantum.

inprimis utrum antecessor minoris seysitus fuit de tali libertate ut de feodo anno et die quo fuit vivus & mortuus, ad hoc q̃ detur dilatio warrantiæ vel non detur. Item vocari poterit ad warrantum, et vocare tam ille qui tenet ad vitam, sicut ille qui tenet in feodo, et eodem modo ille qui tenet ad terminum annorum. Et q̃ ille potest qui tenet ad terminum, quamvis ratio se habeat in contrarium, p̃batur in itinere W. de Ralegh in com̃ Warr̃ de quadam Sibilla, q̃ dotem petiit circa finem rotuli.

7. Maritus vocat uxorem ad warrantum quandoque. Fleta l. vi. c. 23, § 9. Britton, vi. ch. x. § 5.

Maritus uxorē recte vocat ad warrantum etiam sine auxilio curię, (nisi ita sit q̃ fœmina, q̃ de costa viri sumpta fuit, caput excedens, viro suo dominetur) si uxor in brevi non nominetur, ut si recognitum fuerit vel convictum, q̃ vir nihil teneat nisi nomine uxoris suæ, quamvis secundum quosdam potius deberet cadere breve illud: aliud tamen erit (ut videtur) si donationes factæ fuerint ante matrimonium cum seysina et usu per aliquod tempus, quod secus est constante matrimonio. Et quo casu, vir recte vocat uxorem sicut aliam quācunquè personam, et cûm warrantizaverit, et vir amiserit, uxor tenebitur ad excambium, q̃ non est in primo casu. Si autē è contrariò, si vir uxori donationem fecerit ante matrimonium, & uxor per se sine viro implacitetur, non magis sine viro respondebit quàm de alia hæreditate sua, & ipsum (ut videtur) vocare poterit ad warrantum, et si amiserit, q̃ vir teneatur ad excambium, secundum q̃ dicitur de uxore. Cùm autē vir & uxor simul implacitaverint & petant, & vir attornatus fuerit uxoris, & ille qui tenet post-

it always be inquired in the first place whether the ancestor of the minor has been seysed of such a franchise as of fee in the year and on the day on which he was alive and died, for the purpose of allowing or not a delay of the warranty. Likewise a person who is a tenant for life may be vouched or may vouch to warrant, as well as he who holds in fee, and in the same manner he who holds for a term of years. And that he who holds for a term of years may do so, although reason suggests the contrary, is proved in an iter of William de Ralegh in the county of Warwick, concerning a certain Sibilla, who claimed dower, near the end of the roll. to a warranty.

7. A husband vouches his wife to warrant sometimes.

A husband vouches his wife to warrant rightly even without the help of the court, (unless it be that the woman, who was taken from the rib of the man, being taller by the head, domineers over her husband,) if the wife be not named in the writ, as if it be recognised and proved that the husband holds nothing except in the name of his wife, although according to some the writ ought more properly to abate; it will be otherwise, however (as it seems), if donations have been made before matrimony, with the seysine and use for some time, which is otherwise during matrimony. And in which case the husband rightly vouches his wife as any other person whatsoever, and when she has warranted and the husband has lost, the wife will be bound to make compensation, which is not so in the first case. If however, on the contrary, the husband has made a donation to his wife before marriage, and the wife alone by herself be impleaded without her husband, she shall no more answer without her husband than for the rest of her inheritance, and she will be able to vouch him, as it seems, to warrant, and if she shall lose, her husband is bound to make her compensation, according to what is said concerning the wife. But when both the husband and the wife have pleaded together and claimed, and the husband has been the attorney of his wife, and he

modum uxorem vocaverit ad warrantum, oportebit q̄ ipsa iterum compareat in curia, & attornatum faciat virum suum vel alium in placito warrantiæ, quia vir non est attornatus in placito illo quamvis in placito principali: secundum q̄ videri poterit de itinere M. de Pateshull in com̄ Eborum anno regni regis Henrici decimo de Petro de Malo Lacu & Izabella uxore ejus, & Johanne de Besacre. Et sic fiat in omni placito, cùm tenens warrantum vocaverit, q̄ petens faciat attornatum de novo, q̄ quidē non est de tenente.

f. 381 b.

Cap. II.

1. Quibus modis obligatur quis ad warrantizandum.

Itē quis vocare[1] debeat & warrātizare & cui dictū est. Nunc vidēdū qualiter et quibus modis quis obligetur ad warrātiā, sive major sive minor. Et sciendū q̄ per homagiū, et finē factū,[2] et per chartarū sive per aliorū instrumētorum obligationē. Per instrumētorum obligationē, verbi gratia, A. vocat B. ad warrantū versus C. B. sum̄onitus petit q̄ A. ostendat ei qua ratione vocaverit eum ad warrantū. Et si A. statim p̄ferat chartam ipsius B. vel patris sui, vel alterius antecessoris sui cujus hæres ipse fuerit, & quæ dedici non possit. Et si A. talis sit hæres q̄ ei warrantizari debeat, ut si sit hæres ejus qui feoffatus est per chartā illam, vel ejus assignatus, vel hæres assignati, cûm charta de assignatis fecerit mentionē. Et eodem modo si de illis quibus feoffatus dare voluerit, vendere vel legare, et charta fecerit mentionē de war-

[1] "vocari," MS. Rawl. C. 160. | [2] "per finem factum," MS. id.

who is the tenant afterwards has vouched the wife to warrant, it will be incumbent that she should appear again in court and constitute her husband her attorney, or another person in a plea of warranty, because the husband is not her attorney in that plea although he is so in the principal plea, according to what may be seen in the iter of Martin de Pateshull in the county of York in the tenth year of the reign of king Henry, concerning Peter de Malo Lacu and Isabella his wife, and John de Besacre. And so let it be in every plea, when the tenant has vouched a warrantor, that the claimant should constitute an attorney anew, which is not the case with the tenant.

Chapter II.

f. 381 b.

1. In what modes a person is bound to warrant.

Likewise what person ought to be vouched and to warrant and to whom has been discussed. Now we must see how and in what modes a person is bound to warrant, whether he be of full age or a minor. And it is to be known that [he is bound] through homage and through a fine having been made, and through the obligations of charters or of other instruments. Through the obligations of instruments, for example's sake, A. vouches B. to warrant against C. B. having been summoned claims that A. should show for what reason he vouches him to warrant. And if A. forthwith produces a charter of B. himself or of his father, or of some other ancestor of his, whose heir he is, and which cannot be denied: and if A. be such an heir, that a warranty ought to be made to him, as if he be the heir of him who was enfeoffed by that charter, or his assignee, or the heir of his assignee, when the charter has made mention of assignees: and in the same way, if he has wished to give or to sell or to bequeath any portion of those things of which he had been enfeoffed, and the charter has made mention of the warranting and of the pure

rantizatione et puro feoffamento, tunc oportebit q̃ idem B. statim warrantizet, et incontinenti ad melius q̃ poterit respondeat. Et idem q̃ dicitur de charta, dici poterit de confirmatione, si confirmatio ad warrantizationē obligaverit confirmantē.

2. Si minor vocatus fuerit, statim ostendat chartam vel aliud.

Si autē minor infra ætatē existens vocatus fuerit ad warrantū, et cōstiterit q̃ minor sit, ne frivola sit vocatio, ille qui vocat statim in ipsa vocatione ostendat chartas suas vel aliud, per q̃ p̃sumi possit q̃ minor teneatur ad warrantiam sive præsens fuerit sive absens, quia hæc poterit esse ratio, cûm sint nōnulli de jure suo diffidētes, cùm aliud remediū non haberent ad litē p̧trahendam, nisi minorē ad warrantū vocarent. Quod etiam de quolibet majore dici posset[1] warrantū vocante majorem vel minorē. In assisis vero omnibus ubi, si vocans de warranto suo defecerit, nulla alia subsequetur pœna in odiū defaltæ, nisi q̃ per defaltā capiatur assisa. Cùm autē à vocante warrantū ostensæ fuerint chartæ & instrumēta, tūc videndū erit utrū pater vel alius antecessor minoris (si servitiū petatur) fuerit in seysina de servitio illo anno & die, quo fuit vivus et mortuus. Et si ita fuit seysitus, tunc statim warrātizet suo feoffato, sed loquela principalis inter petentē et minorē qui warrantizavit tenenti usq̃ ad ætatē warranti remanebit sine die: secundū q̃ p̧batur de itinere abbatis de Radinge & M. de Pateshull in coñ Warr̃ de Ægidio de Erdington qui sum̄onitus fuit ad warrātizandū W. de Norf. Et quia pater ipsius Ægidii obiit seysitus de servitio ipsius W. postq̃m ipse E. warrantizavit ipsi W. remansit loquela principalis

[1] "possit," MS. Rawl. C. 160.

enfeoffment, then it will be incumbent that the said B. should forthwith warrant and immediately answer in the best way he can. And the same which is said of a charter, may be said of a confirmation, if the confirmation has bound the confirmer to a warranty.

2. If a minor be vouched let the tenant forthwith exhibit the charter or other document.

If, however, a minor being below age has been vouched to warrant and it be established that he is a minor, in order that the vouching him may not be frivolous, let him who vouches him forthwith at the vouching exhibit his charters or other document through which it may be presumed that the minor is bound to warrant, whether he be present or be absent, because this may be the reason, since there are some so distrustful of their right, when they have no other remedy to prolong the suit, unless they vouch a minor to warrant. Which also may be said of any person of full age vouching as a warrantor a person of full age or a minor. But in all assises, where, if the voucher fails of his warrantor, no other penalty follows in hatred of his default, except that the assise shall be held by default. But when by the person vouching a warrantor the charters and instruments have been exhibited, then it is to be seen whether the father or other ancestor of the minor (if a service be claimed) has been in seysine of that service in that year and on that day on which he was alive and died. And if he has been so seysed, then let him forthwith warrant the feoffee, but the principal argument between the claimant and the minor, who has made warrant to the tenant, shall remain without a day until the full age of the warrantor; according to what is proved in the iter of the abbot of Reading and Martin de Pateshull in the county of Warwick, concerning Egidius of Erdington, who had been summoned to warrant William of Norfolk. And because the father of Egidius himself died seysed of the service of William himself, after Egidius himself had warranted to William himself, the principal argu-

sine die versus petentē usq̃ ad ætatē E. et sic minor infra ætatem warrantizabit suo feoffato & tenenti ꝑpter seysinā antecessoris de servitio, q̃ recepit à suo feoffato anno et die quo obiit. Si autē antecessor seysitus nō fuit anno et die &c. tunc minor infra ætatē nec ad warrantiā nec ad principale placitū respondebit.

3. Aliquando sine chartæ ostensione.

In casu tamē poterit minor vocari ad warrātū et sum̄oniri sine chartæ ostēsione, si infra ætatē vocatus fuerit ad warrantum ab aliquo suo tenente, ratione alicujus tenemēti de quo infra ætatē feoffatus fuerit tenens, quia in utroq̃ placito tam warrantiæ q̃m principali respōdebit. Et unde cum minor sic vocatus fuerit ad warrantū, inquirendū erit utrū tenementum ratione cujus vocatus est ad warrantū, sit hæreditas descendens vel perquisitū, & q̃ dicitur de servitio dici possit de homagio.

f. 382.

4. Aliquando per homagium.

Per homagiū vero captū obligatus est dominus ad warrantiā qui homagiū cepit, quia esto q̃ tenens nullā chartā habuerit, vel cùm habuerit, illam non habeat ad manum, sive feoffamentū illud fuerit novum vel vetus, sicut à cōquestu Angliæ, de quo raro contingit q̃ chartæ ꝑferantur, si homagiū intervenerit, & hoc ꝑbari possit, capitalis dominus sine charta warrantizabit. Et si fortè dicat q̃ sine charta warrantizare non debeat, responderi poterit à tenente sic: Tu teneris michi terram petitam warrantizare, quia ego sum inde homo tuus, & tu inde homagiū meū recepisti, & in seysina es de servitio meo, & pater meus et antecessores patris mei inde fuerunt homines antecessorū tuorum. Et q̃ ita sit, ꝑducat sectam sufficientem,

ment against the claimant remained without a day until the full age of Egidius; and so a minor under age shall warrant to his feoffee and tenant on account of his ancestor's seysine of a service, which he received from his feoffee in the year and on the day on which he died. But if the ancestor has not been seysed in the year and on the day, &c., then the minor under age shall answer neither to the warranty nor to the principal plea.

3. Sometimes without the exhibition of a charter.

But a minor may be vouched to warrant and may be summoned without the exhibition of a charter in a case, if he be vouched under age to warrant by some tenant of his by reason of a certain tenement, with which the tenant has been enfeoffed under age, because he shall answer in either plea, that of warranty or the principal plea. And hence if the minor be thus vouched to warrant, it will have to be inquired whether the tenement by reason whereof he has been vouched to warrant, is an inheritance or an acquisition, and what is said of a service may be said of homage.

f. 382.

4. Sometimes through homage.

But the lord, who has taken homage, is bound to a warranty through the homage taken by him, for let it be that the tenant has had no charter, or if he has had a charter, he has it not at hand, whether the enfeoffment has been new, or ancient, as from the conquest of England, concerning which charters are rarely produced, if homage has intervened, and this can be proved, the chief lord shall warrant without a charter. And if by chance he should say that he ought not to warrant without a charter, an answer of this kind may be made by the tenant: You are bound to warrant to me the land claimed, because I am thereof your man, and you have thereof receiyed my homage, and are in seysine of my service, and my father and the ancestors of my father were thereof the men of your ancestors. And that it is so let him produce a sufficient sect, a living

vivam vocē, vel aliq̃m qui paratus sit hoc disrationare ꝑ corpus suū si opus fuerit. Et si ille qui vocatus est hoc dedicere non possit, sine charta warrantizabit, et hoc nisi ille qui vocatus est docere possit homagium esse conditionale, s. salvo jure cujuslibet in suo casu.

5. Si vocatus ad warrantum homagium negaverit.

Si autē vocatus homagium illud omnino negaverit et defenderit, tunc justic. audiant ꝓbationes tenentis, qui se ꝓbare possit q̃ sit homo talis, & quòd ipse talis homagium suū ceperit, vel antecessorum suorum in forma p̃dicta, per juditium warrantizabit. Sed cū ꝓpter homagium vocetur aliquis ad warrantum q̃ dedici non possit, nunquid poterit dominus ꝑ voluntate sua homagium tenentis sui wayviare & sic de warrantia evadere? nō, quia ex hoc tale sequeretur incōveniens, q̃ ꝑ mīnimo servitio magnum quid warrantizaret tenenti suo. Poterit tamē tenens quando voluerit tenementum suum wayviare, vel illud dño suo restituere simul cum homagio et ex causa.

6. Per cyrographum et finem factum.

Obligatur etiam quis ad warrātiam ꝑ cyrographum & finē factum, ita q̃ si A. ꝓferat cyrographum de fine facto in curia dñi regis inter ipsum & B. vel eorum antecessores quorū hæredes ipsi sunt, tunc secundū illud cyrographum (q̃ de facili dedici non poterit) fiet juditiū de warrantizatione, in forma tamen supradicta de minore, si minor ad warrantū vocatus fuerit, s. si anno & die &c. Sed nonne tenet̃ minor infra ætatē ad finē factū respōdere etiā etsi nō añō & die? & de hoc dicetur inferius de exceptionibus.

infra, fol. 421 b.

voice, or some one who is ready to deraign this by his own body, if it shall be necessary. And if he, who is vouched, cannot gainsay this, he shall warrant without a charter, and this unless he who is vouched can show that the homage is conditional, that is saving the right of each person in his own case.

5. If the person vouched to warrant has denied the homage.

But if the person vouched has altogether denied the homage and defended himself, then let the justiciaries hear the proofs of the tenant, who, if he can prove that he is the man of so-and-so, and that so-and-so himself has taken his homage or that of his ancestors in the form aforesaid, he shall warrant through the judgment. But when a person is vouched to warrant on account of homage, which cannot be gainsaid, will the lord forsooth be able according to his pleasure to waive the homage of his tenant and to escape from the warranty? Not so, because therefrom would follow this inconvenience, that he might warrant to his tenant something great in return for a trifling service. The tenant, however, will have the power whenever he may wish to waive his tenement, or to restore it to his lord together with his homage and for cause shown.

6. Through a chirograph and the making of a fine.

A person also is bound to a warranty through a chirograph and the making of a fine, so that if A. produce a chirograph of a fine having been made in the court of the lord the king between himself and B. or the ancestors of those whose heirs they are, then according to that chirograph (which cannot well be gainsaid) judgment shall be made concerning the warranting, in the form however above stated in the case of a minor, if a minor has been vouched to warrant, to wit if in the year and on the day &c. But is not the minor bound to answer upon a fine having been made, even if not in the year and on the day &c.? And of this mention will be made in treating of exceptions.

7. Item tacite vel expresse.

Non solū obligatur persona feoffatoris (ut p̃dictū est) & rationibus p̃dictis, poterit etiā tenemētū obligari cū psona tacite vel expresse. Expressè, ut si quis ita dicat, in charta donationis, q̄ ipse & hæredes sui warrātizabūt donationē suā ex tali certo teñto q̄ tunc tenent ad q̃mcunq̃ postmodū pvenerit, & sic remanebit res expressè obligata ad warrantiā, ut p̄bat̃ in rotulo de term̃ P. añ regis H. decimosexto in com̃ Midd̃, de Alic. de War̃ & de R.[1] de Renge, ubi Alic. warrantizavit p̄ judiciū cur̃, qui[2] habuit teñtū literaliter & specialiter obligatū. Tacitè, ut si feoffator tēpore donationis satis habuit unde warrantizet etiā sine expressione, id qd' tūc habet remanet obligatū, quia nō valet obligatio psonæ, nisi habeāt si opus fuerit unde possit excābiū facere. Et p̄ hoc sic obligatur tenemētū tacite.

8. Si dominus capitalis ad quem terra pervenerit ut eschæta vel alio modo, cum non sit hæres, quia res transit cum onere.

Sed quid si tenemētum sic obligatū tacite vel expressè, p̄pter defectum vel p̄pter delictum feoffatoris tanquam eschaeta deveniat in manum domini regis vel capitalis domini superioris? Quæro an ille teneatur ad warrantiam cùm ad warrantū vocetur? et videtur q̄ sic, quia res cum homine[3] transit ad quemcunq̃. f. 382 b.

9. Si rex debeat warrantizare, dicere poterit quod sine rege re-

Poterit etiam ipse rex inter alios ad warrantiam obligari rationibus supradictis, sed tamen̄ nō potest vocari sicut vocantur privatæ personæ, quia sum̄oneri non potest per breve, et ideo dicere poterit ille cui rex warrantizare debeat, cum quadam curialitate, sic:

[1] "Ricardo," MS. Rawl. C. 160.
[2] "quia," MS. id.
[3] "onere," MS. id.

7. Likewise tacitly or expressly.

The person of the feoffor is not alone obliged (as has been above stated) and for the reasons above stated, the tenement also may be bound together with the person tacitly or expressly. Expressly, as if a person should say thus in the charter of donation, that he himself and his heirs will warrant his donation out of a certain tenement, which they then hold, to whomsoever it may come hereafter, and so the thing will remain expressly bound to a warranty, as is proved in the roll of Easter term in the sixteenth year of king Henry in the county of Middlesex, concerning Alice de Warrenne and concerning R. de Renge, where Alice warranted through a judgment of the court, because she had a tenement literally and specially bound. Tacitly, as if the feoffor at the time of the donation had sufficient out of which to warrant even without an expression of it, that which he then had remains bound, because a personal obligation does not avail, unless he have wherewith to make compensation, if it shall be necessary. And through this a tenement is thus tacitly bound.

8. If the chief lord, to whom the land has come as an escheat or f. 382 b. in any other manner, when he is not the heir, because the thing passes with the charge.

But what if a tenement thus bound tacitly or expressly on account of the default or of the delict of the feoffor has passed as an escheat into the hand of the lord the king or of a superior chief lord? I ask whether he is bound to the warranty, when he is vouched to warrant? and it seems that it is so, because the thing passes to every one with the charge.

9. If the king ought to warrant he may say, that he cannot

Even the king himself amongst others may be bound to warrant for the reasons above stated, but he cannot be vouched as private persons are, because he cannot be summoned by a writ, and therefore he, whom the king ought to warrant, may say with a certain courtliness

spondere non poterit, supra, f. 171 b.

q sine rege respondere non poterit, eo quòd habet chartam suam de donatione vel confirmatione, per quam si amitteret, rex ei teneretur ad escambium, vel alia ratione, q ipse rex est in seysina de homagio & servitio suo et hujusmodi, & quoniā ita fieri solet multotiens, q tenens sine rege respondere non poterit, ut litem ꝑtraheret, ratione cujuslibet chartæ quam ꝑferret in juditio de confirmatione, ꝑvisum fuit et concessum coram ipso rege in dedicatione abbathiæ de Hayles in præsentia ix. episcoporū, & coram cōñ Richardo & aliis pluribus comitibus sic:

Britton, iii. ch. xi. § 22. ch. xxii. § 7.

10. Quod nullus vocat regem ad warrantum, nisi teneatur ad escambium.

Matth. Paris-Hist. Anglorum 5 Nov. a° 1251.

Quòd nullus de cætero regem nominet in judicio (ut prædictum est) nisi ita sit q rex teneatur ad escambium, si tenens amiserit, & secundum q tunc judicatū fuit inter comitem Gloc. et abbatem S. Edmundi, quia chartæ abbatis ꝑ quas dicebat q sine rege respōdere non potuit, loquebantur tantū q rex reddidit, concessit & confirmavit, et de nulla warrantia ꝑ quā teneretur ad escambium si abbas amitteret. Et sciendum q nihil aliud est dicere, non possum sine rege respondere, qm vocare ipsum ad warrantū, licet ꝑ alia verba.

Cap. III.

1. Quod warrantia debet designare proprio nomine, si possit, vel quod tantundem valet.

Cum autē quis warrantum vocaverit, debet warrantum suum designare ꝑprio nomine, si possit, si fuerit in rerū natura. Si autem in utero matris, aliud erit dicendum, quia si in nomine erratum fuerit sive in persona, tenens de facili poterit amittere, vel si ita vocaverit: voco filium talis sine expressione nominis,

thus ; that he cannot answer without the king, because he has his charter of donation or of confirmation, through which, if he should lose, the king is bound to him to make him compensation, or for another reason, that the king himself is in seysine of his homage and his service, and such like, and since it is accustomed so to be done very often. that the tenant cannot answer without the king, that he may prolong the suit,. by reason of a certain charter which he produces in court concerning a confirmation, it has been provided and granted in the presence of the king in the dedication of the abbey of Hayles in the presence of nine bishops and in the presence of Earl Richard and several other earls :

answer without the king.

That no one henceforth shall name the king in a judgment (as above stated) unless it be so, that the king is bound to make compensation, if the tenant shall lose, and according to what was then adjudged between the earl of Gloucester and the abbot of St. Edmunds,. because the charters of the abbot, through which he said that he could not answer without the king, said only that the king rendered, granted, and confirmed, and spoke of no warranty whereby he was bound to make compensation, if the abbot should lose. And it is to be known that to say that I cannot answer without the king is nothing else than to vouch him to warrant, although it is by other words.

10. That no one should vouch the king to warrant unless he be bound to make compensation.

Chapter III.

When, however, a person vouches a warrantor, he ought to designate the warrantor by his proper name, if he can, if he exists in the nature of things. But if he be in the womb of his mother something else must be said, because if there be an error in the name or in the person the tenant may easily lose ; or if he should vouch him thus, I vouch the son of so-and-so without the expression of a name, such a vouching does not avail, when so-and-

1. That the warrantor ought to be designated by his proper name, if possible, or what is equivalent.

non valet talis vocatio, cùm talis plures habuerit filios valet tamen, si non nisi unum. Si autem ita vocaverit: voco talem filium & hæredem talis, valet talis vocatio, licet hæredes plures habeat remotos & propinquos, quia hoc de propinquiore erit intelligendum. Sed quid si plures appareant, qui se faciunt hęredes, nec appareat quis eorum propinquior, videtur quod sub disjunctione vocandus erit warrantus, ut si dicatur: Voco talem vel talem quicunque eorum hæres fuerit talis, vel si hæres in utero fuerit sic, & ubi uxor petierit mitti in possessionē nomine ventris, ut si dicatur: voco talem ꝑprio nomine qui apparens est, vel illum qui in utero est, nisi ad monstrū declinaverit, vel in utero mortuus fuerit, & semper exprimi debet causa q̃ dubitationē inducit, vel incertitudinē: ut si dicat istum vel illū quicunq̃ istorū obtinuerit, sicut inter avunculū & nepotē legitimum, & bastardū et hujusmodi. Sufficit enim si tantū faciat quantum facere
f. 383. potest, cùm uterquè se gerat pro hærede. Et hoc fieri possit (ut videtur) ad similitudinem exhæredationum, quia si quis debeat exhęredari, nominatim debet exhæredari, et eodem modo warrantus nominatim vocari. Ut si dicatur: Titius filius meus exhæres esto. Item valet exhæredatio, et sufficit si dicatur, Filius meus exhæres esto, non adjecto ꝑprio nomine, maximè si alius filius non existat, quia nō refert utrum quid fiat vel q̃ tantundē valeat. Cûm autē sit aliquis qui se facit hæredem et hæreditatem petierit, et mulier similiter si petat mitti in possessionē nomine ventris, vel cûm plures se faciant hæredes, nec cōstare poterit quis eorū hæres ꝑpinquior et rectior sit ꝑpter dubium eventum, et cùm nullus warrantizare teneatur ante hæreditatis additionē,[1] tutius et melius est warrantiam

[1] "aditionem," MS. Rawl. C. 160.

so has several sons; it avails, however, if he has only one. But if he should vouch him thus, I vouch so-and-so the son and heir of so-and-so, such a vouching avails, although he may have several heirs remote and near, because this will have to be understood of the nearest; but what if several appear, who make themselves out to be heirs, and it is not apparent which of them is the next heir? it seems that the warrantor ought to be vouched disjunctively, as if it be said: I call so-and-so, whichever of them is the heir of so-and-so; or if the heir is in the womb thus: and when the mother has claimed to be put into possession in the name of her belly, as if it be said: I vouch so-and-so in his proper name, who is apparent, or him who is in the womb, unless he turns out to be a monster, or has died in the womb, and there ought to be always expressed the cause which induces doubt or uncertainty, as if he shall say this or that person, whichever of them has prevailed, as between an uncle and a lawful nephew, and a bastard and such like. For it is sufficient if he does as much as he can, when each of them holds himself out as the heir; and this may be done as it seems after the likeness of disherisons, because if a person ought to be f. 383. disherited, he ought to be disherited by name, and in the same way a warrantor ought to be vouched by name. As if it be said, Let Titius my son be disherited. Likewise the disherison is valid, and it is sufficient, if it be said, let my son be disherited, without adding his proper name, especially if another son does not exist, for it does not matter whether a thing is done or what is equivalent. But when there is some one who holds himself out to be the heir and claims the inheritance, and a woman likewise if she claims to be put into possession in the name of her belly, or when several persons hold themselves out to be heirs, nor can it be established which of them is the nearer and more rightful heir on account of a dubious event, and when no one is bound to warrant until he has entered on the inheritance, it is safer and better to suspend the warranty until a certainty

suspendere quousq̃ inde haberi poterit certitudo et cōstiterit de veritate ad similitudinē istius casus.

2. Si warrantus de dote feloniam fecerit, et inter duos capitales dominos de eschæta contentio habeatur.

Quia esto q̣ quis implacitatus fuerit de duabus partibus alicujus manerii, et mulier de t̃tia p̣te q̣m tenet nomine dotis et unde talis est warrantus de dote sua, et pendēte placito q̣ ille qui tenuerit duas p̣tes feloniam fecerit, et utlagatus fuerit anteq̣n mulier de tertia p̣te eum ad warrantū vocaverit, et cùm illæ duæ p̣tes ratione termini sui fuerint in manu dn̄i regis, et inter duos dominos de eschaeta contentio habeatur, nec sciri posset quis eorū debeat obtinere, loquela mulieris ponitur et remanebit sine die, vel ad diem diffusum et in suspenso,[1] quosq̃ inde habeatur certitudo: ut de itinere ultimo W. de Ralegh in com̃ Warr̃ circa finē rotuli. Et ita (ut videtur) fieri deberet de p̃missis. Item cùm plures vocati fuerint ad warrantū erratū fuerit in nomine unius vel plurium, perinde habendum erit (ut videtur) cùm sint quasi unum corpus, ac si erratum esset in nominibus omnium, sicut videri poterit de pluribus petētibus vel pluribus tenentibus.

Cap. IV.

1. Si quis warrantum vocaverit, qui sit sub potestate sua, licet auxilium petierit, non habebit auxilium curiæ.

Cum autem quis vocatus fuerit ad warrantiam, qui fuerit sub potestate vocantis, licet auxilium curiæ petierit, auxilium non habebit, quem quidem si non produxerit, amittere poterit de facili.

2. Item si talem, qui non fuerit sub potestate regis,

Si autem warrantus extra suam potestatem fuerit, et in potestate regis ubicunque, auxilium habebit. Si autem extra potestatē regis, cûm rex ipsum p̣ducere

[1] "diffusum in suspenso," MS. Rawl. C. 159.

thereon can be attained, and it can be established concerning the truth after the likeness of this case.

2. If a warrantor of dower has committed felony and there be a contention between two chief lords concerning the escheat.

For let it be that a person has been impleaded for two-thirds of a manor, and a woman for one third, which she holds in the name of dower, and whereby so-and-so is the warrantor of her dower, and pending the plea he who is the tenant of the two parts has committed felony, and has been outlawed before the woman has vouched him as a warrantor for her third part, and when the two-thirds in respect of his term have been seized into the hand of the king, and a contention arises between two lords respecting the escheat, nor can it be known which of them ought to prevail, the argument of the woman is put off and will remain without a day, or to a day diffused and in suspense, until certainty thereon is obtained, as in the last iter of William de Ralegh in the county of Warwick, about the end of the roll. And so (as it seems) it ought to be done in the premises. Likewise, when several persons have been vouched to warrant, if an error has been made in the name of one or of several, it will have to be accounted the same (as it appears), since they are as it were one body, as if an error had been made in the names of all of them, as may be seen concerning several claimants or several tenants.

1. If a person shall vouch a warrantor, who his under his power, although he may have sought the help of the court, he shall not have it.

Chapter IV.

When indeed a person has been vouched to warrant, who is under the power of the voucher, although he shall claim the help of the court, he shall not have that help, and if he has not produced him, he may easily lose.

2. Likewise, if such a person, who is not under the power of the king, but let him

But if the warrantor be beyond his power, and in the power of the king anywhere, he shall have help. But if he be beyond the power of the king, since the king cannot produce him, he shall not have help, and let him who

sed ipsum producat, si possit.

non possit, auxilium non habebit, et ideo producat eum qui vocavit, vel rem petitam amittat.

3. Si warrantus fuerit infra libertatem alicujus ubi non currit breve regis.

Si autem sit aliquis qui talem libertatem habeat, q breve regis ibi non currat ꝑpter dominum regem, qui sibi libertatem concessit, mandetur domino libertatis quod warrantum distringat, q si non fecerit, distringatur ipse per terras suas extra libertatem q warrantum ꝑducat. Si autē terras extra non habuerit, tunc non obstāte libertate apponat rex manum in defectum ipsius, ita q jus nō deficiat, cûm autē warrant[9] sine auxilio ꝑduci nō possit, tūc fiat brē de sum̄onēdo warrātum in hac forma:

f. 383 b.

Breve, si sine auxilio produci non possit.

Rex vic. salutē. Sum̄oneas p bonos sum̄onitores A. q sit coram justic. &c. tali die ad warrantizandū B. tantū træ cū ptinētiis in tali villa qm E. in eadē curia corā eisdē justic. &c. clamat ut jus suū versus p̃dictū B. et unde idē B. in eadē curia nostra corā eisdē justic. nostris vocavit ipsū A. ad warrantū versus p̃dictum E. et habeas ibi sum̄onitores et hoc breve. Teste &c. vel aliter: ad warrātizandum B. custodiā træ q̃ fuit E. & qm D. in curia nostra &c. clamat versus eundē B. ratione filii & hæredis ipsius E. q̃m habet in custodia sua de dono Johannis regis patris nostri, ut dicit. Et unde idem B. vocavit ipsū A. ad warrantū versus ipsū D., et habeas &c. vel aliter: ad warrātizādū tantū træ B. &c. et unde idē B. sum̄onitus est in curia nr̃a coram nobis ad respōdēdum nobis, quo warranto tenet tantū træ vel quid tale q nos clamamus ut jus nostrū vel eschaetā, et hujusmodi, & in omni casu generaliter ubi jacet warranti vocatio, fiat

has vouched him produce him, or let him lose the thing claimed. produce him, if he can.

But if there be any one who has such a franchise, that the king's writ does not run there on account of the king himself, who has granted to him such a franchise, let a mandate go to the lord of the franchise, that he should distrain the warrantor, which if he fail to do, let him be himself distrained by his own lands outside his franchise, that he should produce the warrantor. But if he should not have any lands outside his franchise, then notwithstanding his franchise let the king apply his hand upon his default, so that justice shall not fail; when, however, the warrantor cannot be produced without the help [of the court], then let a writ issue to summon the warrantor in this form: 3. If the warrantor be within the franchise of any one where the king's writ does not run. f. 383 b.

The king to the viscount greeting. Summon by good summoners A. that he should be before our justiciaries on such a day to warrant to B. so much land with its appurtenances in such a vill, which E. in the said court before our said justiciaries, &c. claims as his right against the said B., and whereof the said B. in our said court before our said justiciaries has vouched the said A. to warrant against the aforesaid E., and have there the summoners and this writ. Witness, &c.: or otherwise: to warrant to B. the custody of the land, which was E.'s, and which D. in our court, &c. claims against the said B. by reason of the son and heir of the said E., whom he has in his wardship by the gift of king John our father as he says, and whereof the said B. has vouched the said A. to warrant against the said D., and have there, &c., or otherwise to warrant so much land to B., &c., and whereof the said B. has been summoned in our court before us to answer to us by what warrant he holds so much land, and something of such kind, as we claim to be our right as an escheat, and such like, and in all cases generally where the vouching of a warrantor lies, let mention be made in the writ of summons concerning the form of the 4. A writ, if he cannot be produced without help.

mētio in brevi de sum̄onitione de forma placiti, & de modo petitionis in brevi originali cōtento, sive teñtū petatur sicut t̄ra vel redditus, vel q̄ ad teñtum p̄tineat, sicut advocatio ecclesiæ, jus pascendi, sive pastura, rationabile estoveriū, iter vel actus, et hujusmodi, vel q̄ ad aliq̄m p̄tineat ratione teñti, sicut servitiū, relevium, custodia, & maritagiū.

5. Si minor vocatus fuerit ad warrantum de dote vel in placito de recto, tunc summoneatur custos ejus.

Si autē minor vocandus sit ad warrantū in placito aliquo, sive sup̄ recto ipso sive sup̄ dote, tunc fiat breve de sum̄onendo custodem, q̄ sit ad certū diē, et ibi habeat hæredē ad warrantizandū. Rex vic. salutē. Sum̄oneas p̄ bonos sum̄onitores A. custodē B. filii et hæredis C., & D. custodē terræ ejusdē hæredis, q̄ sit corā justic. nostris tali die, & ibi habeat hæredē p̄dictū ad warrantizandum E. tantū terræ cū p̄tinentiis in tali villa q̄ p̄dictus A. in curia nostra &c. clamat ut jus suum vel in dotē versus eundē B., & unde idē A. in eadē curia nostra corā justic. nostris vocavit p̄dictū hæredē ad warrantū versus eum. Si autē unus & idē habeat tam custodiā t̄ræ quā hæredis, tunc sum̄oneatur sine aliis, q̄ sit & habeat hæredem. Si autem hæres aliquis teneatur ad warrantiam qui nihil tenuerit de hæreditate matris, ratione cujus vocatus est ad warrantum, sed paraster vel antecessor suus ad vitam suam per legem Angliæ, et cùm hæres in curia respondit post summonitionem ei factam q̄ nihil tenet de prædicta hæreditate matris suæ, sed paraster suus, p̄pter hoc non differatur warrantia ad vitam parastri, sed sum̄oneatur paraster, q̄ sit &c. ad audiendum con-

plea and concerning the mode of petition contained in the original writ, whether the tenement be claimed as a land or a rent, or something appertaining to a tenement, as the advowson of a church, the right of feeding or a pasture, a reasonable estover, a path or a bridle way and such like, or something which appertains to a person in regard of a tenement, as a service, a relief, wardship and maritage.

5. If a minor be vouched to warrant concerning dower or in a plea of right, then let his guardian be summoned.

If, however, a minor is to be vouched to warrant in any plea, whether upon the right itself or upon dower, then let a writ of summons go to the guardian, that he be present on a certain day and there have the heir present to warrant. The king to the viscount greeting. Summon by good summoners A. the guardian of B. the son and heir of C., and D. the guardian of the land of the said heir, that he be present before our justiciaries on a certain day, and there produce the heir aforesaid to warrant to E. so much land with its appurtenances in such a vill, which the aforesaid A. in our court &c. claims as his right or for dower against the said B., and whereof the said A. in our court before our justiciaries has vouched the aforesaid heir to warrant against him. But if one and the same person has the custody of the land as well as of the heir, then let him be summoned without the others, that he be there and produce the heir. But if an heir be bound to warrant, who has nothing of the inheritance of his mother, by reason whereof he is vouched to warrant, but his step-father or ancestor has it for life through the law of England, and when the heir has answered in court after the summons made to him that he holds nothing of the inheritance aforesaid of his mother, but his step-father does, let not on that account the summons be deferred for the life of his step-father, but let his step-father be summoned that he be present, &c. to hear the consideration of the court concerning the aforesaid warranty,

siderationem curiæ de p̃dicta warrantia, vel ad warrantizādum cum p̃dicto hærede per tale breve:

6. Si hæres, qui vocatus sit ad warrantum, nihil teneat de hæreditate materna, sed paraster suus, tunc summoneatur uterque, sive hæres fuerit major vel minor. f. 384.

Rex vicecom̃ salutem. Sum̄oneas per bonos sum̄onitores A. q̃ sit coram justic. &c. ad audiendum considerationem ejusdem curiæ nostræ, de warrantia tantæ terræ cum pertinentiis in N. q̃m B. in curia nostra &c. clamat ut jus suum versus E. vel sic: Ad warrantizandum B. simul cum C. filio & hærede talis mulieris, scilicet tantam terram cum p̃tinentiis in N. quam B. in eadem curia nostra coram eisdem justiciariis nostris &c. clamat ut jus suum versus Edwardū, et unde idē Edwardus in eadem curia nostra &c. coram eisdem justiciariis vocavit inde ad warrantum p̃dictum B. versus eundem E. Et unde idē C. dicit q̃ nihil tenet de hæreditate talis matris suæ, nec ad warrantiā illam respondere potest, sine prædicto A., qui hæreditatem illam tenet ad vitam suam per legem Angliæ.

Cap. V.

1. Quod quis potest se essoniare.

Ad diem verò summonitionis legitimæ quindecim dierum poterit quilibet eorum se essoniare si voluerit, petens, tenens, & warrantus simul, vel vicissim, ita q̃ quilibet eorum habeat unicum essonium secundum q̃ superiùs dicitur de essoniis.

2. Si defaltam fecerit, capiatur terra in manum domini regis.

Et si ad diem summonitionis fecerit petens defaltam, p̃sente tenente, & se liti offerente, recedet tenens quietus de brevi illo, secundùm q̃ superius plenius dicitur de defalta. Et eodem modo si tenens, tunc capiatur terra in manum domini regis ut supra. Si autem warrantus defaltam fecerit præsentibus tam petente, quàm tenente, et antequàm warrantus in curia comparuerit, capiatur de terra warranti in manum domini regis ad valentiam ĩræ petitæ, si warrantus

or to make warrant together with the aforesaid heir, by a writ of this kind:

6. If the heir, who is vouched to warrant, holds nothing of the maternal inheritence, but his step-father, then let each be summoned, whether the heir is of full age or a minor. f. 384.

The king to the viscount greeting. Summon by good summoners A. that he be present before our justiciaries, &c. to hear the consideration of our said court concerning a warranty of so much land with its appurtenances in N., which B. in our court &c. claims as his right against E.: or thus: to warrant to B. together with C. the son and heir of such a woman, to wit, so much land with its appurtenances in N., which B. in our said court before our said justiciaries claims as his right against Edward, and whereof the said Edward in our said court, &c. before our said justiciaries has called to warrant thereon the aforesaid B. against the said E., and whereof the said C. says that he holds nothing as heir of so-and-so his mother, nor can he answer to the said warranty without the aforesaid A., who holds that land for his own life by the law of England.

Chapter V.

1. That a person may essoin himself.

But upon the day of the lawful summons of fifteen days any one of them, the claimant, the tenant or the warrantor may essoin himself, if he pleases, at the same time or in turns, so that each of them may have a single essoin according to what is said above concerning essoins.

2. If he has made default, let the land be taken into the hand of the lord the king.

And if the claimant has made default on the day of summons, the tenant being present and presenting himself for trial, let the tenant withdraw acquitted of that writ, according to what is said above more fully concerning default. And in the same way if the tenant [has made default], then let the land be taken into the hand of the lord the king, as above. But if the warrantor has made default, the claimant as well as the tenant being present, and before the warrantor has made default, let there be taken of the land of the warrantor into the hand of the lord the king up to the value of

terram habuerit in eodem comitatu. Et idem si tenens se essoniaverit, & sic fiat irrotulatio: A. tenens scilicet vel A. essoniator tenentis optulit se quarto die versus B. de placito, q̃ idem B. warrantizet ei tantum terræ cum pertinentiis in tali villa, quam C. clamat ut jus suum versus eum, et unde idem A. in curia &c. vocavit ipsum B. ad warrantū versus p̃dictum C., & prædictus B. non venit & summonitio &c. Juditium. Capiatur terra in manum domini regis de terra ipsius B. ad valentiam &c. et dies &c. & B. summoneatur q̃ sit tali die responsurus & ostensurus &c. ut supra de defaltis. Idem dies datus est tali petenti in banco.

3. Breve ad capiendam terram in manum domini regis per defaltam, ad valentiam super warrantum, magnum cape.

Rex vicecom̃ salutem. Cape in manum nostram per visum legalium hominum de comitatu tuo de terra in balliva tua pro defalta ipsius A. ad valentiā tantæ terræ cum p̃tinentiis in tali villa, q̃ B. de N. in curia nostra &c. clamat ut jus suum versus C. & unde idem C. in eadem curia nostra coram justic. &c. vocavit eundē A. ad warrantum versus eundē B. & diem captionis &c. Et summoneas per bonos summonitores prædictum A. quòd sit &c. ut supra. Et idem dies dabitur tam petenti quā tenenti, si præsentes fuerint personaliter, vel per attornatos vel per essoniatores, si se essoniaverint. Si autem in eodem com̃, ubi terra petitur, non habeat warrantus terram, cûm defaltam fecerit, de qua capi possit ad valentiam, sed in alio, nec constare poterit quantum terræ vicecom̃ capere
f. 384 b. debeat in suo com̃ in manum d̃ni regis, quia nescit

the land claimed, if the warrantor has land in the same county. And the same, if the tenant has essoined himself, and let the enrolment be made in this manner, A. the tenant, to wit, or A. the essoiner of the tenant, has presented himself on the fourth day against B. on a plea that the said B. should warrant to him so much land with its appurtenances in such a vill, which C. claims as his right against him, and whereof the said A. in the court, &c. has vouched the said B. to warrant against the aforesaid C., and the aforesaid B. has not come, and the summons, &c. Judgment: Let there be taken into the hand of the lord the king of the land of the said B. up to the value, &c. and days, &c., and let B. be summoned that he be present on a certain day in order to answer and to show, &c. as above concerning defaults. The same day is given to the said claimant in the Bench.

3. A writ to take land into the hand of the lord the king through default up to the value, against a warrantor. A great Cape.

The king to the viscount greeting. Take into our hand by the view of loyal men of your county of land in your bailiwick on account of the default of the said A. up to the value of so much land with its appurtenances in such a vill which R. of N. in our court, &c. claims as his right against C., and whereof the said C. in our said court before our justiciaries, &c. has vouched the said A. to warrant against the said B., and the day of the caption, &c. And summon by good summoners the aforesaid A. that he be, &c. as above. And the same day shall be given to the claimant as to the tenant, if they be present personally, or by their attorneys, or by their essoiners if they have essoined themselves. But if the warrantor has not any land in the same county, where the land is claimed, when he has made default, from which there may be taken land up to the value, but in another county, nor can it be established how much land the viscount ought to take in his own county into the hand of the lord the king, because he does not know the value of the land claimed in the other county, it is f. 384 b.

de valore terræ petitæ in alio com̃, oportet igitur q̃ prius fiat extensio de terra petita, & facta extensione mandetur vicecom̃ de alio com̃ quantū terræ capere debeat p̃ defaltam warranti per tale breve, per q̃ fiat extensio.

4. Si terra petita fuerit in uno comitatu et terra warranti in alio, tunc fiat extensio per tale breve.

Rex vicecom̃ salutem. Præcipimus tibi, q̃ assumptis tecum duodecim tam militibus quàm aliis liberis, legalibus et discretis hominibus de visneto tali, in p̃pria persona tua accedas ad talē locum, et per eorum sacramentum extendi facias et appreciari tantam terram in tali villa &c. vel aliter & breviùs. Præcipimus tibi q̃ per sacramētum p̃borum & legalium hominum de com̃ tuo extendi facias & appreciari tantam t̃ram cum p̃tinentiis in tali villa, q̃m talis in curia nostra clamat &c. Et unde idem talis vocavit talē ad warrantum &c. Et extensionem illam & appreciationem scire facias tali die vel sine dilatione evidenter, distincte & aperte per literas tuas sigillatas & per duos legales & discretos homines ex illis, per quos extensio illa et appreciatio facta fuit. Et habeas ibi hoc breve et nomina eorum, per quorum sacramenta extensionē et appreciationem illam feceris. Teste &c. Et cùm per extensionem constiterit de valore, tunc primùm p̃cipiatur vicecom̃ ubi warrantus terram habet, quòd capiat in manum domini regis ad valentiam per hoc breve.

5. Breve de capienda terram pro defectu.

Rex vicecom̃ salutem. Cape in manum nostram per visum &c. de terra talis per defectum ipsius talis ad valentiam centum solidatarum terræ p̃ una carucata terræ cum p̃tinentiis in tali villa in tali comitatu, quam talis in curia nostra &c. clamat ut jus suum

incumbent therefore that there ought to be first made an extent of the land claimed, and upon the extent having been made, let a mandate be given to the viscount of the other county how much land he ought to take through the default of the warrantor by such a writ, whereby an extension may be made.

4. If the land claimed be in one county and the land of the warrantor in another, then let there be made an extent by a writ of this kind.

The king to the viscount greeting. We enjoin you that having taken with you twelve as well knights as other freeholders, loyal and discreet men of your visne, you go in your own person to such a place, and by their oath cause to be extended and appraised so much land in such a vill, &c. : or otherwise and more briefly : We enjoin you that by the oath of honest and loyal men of your county you cause to be extended and appraised so much land with its appurtenances in such a vill, which so-and-so in our court claims, &c. And whereof the said so-and-so has vouched such a person as a warrantor. And cause that extent and appraisement to be made on such a day without delay evidently, distinctly, and openly by your sealed letters and by two loyal and discreet men of those, through whom that extent and appraisement have been made. And have there this writ and the names of those by whose oaths you have made that extent and appraisement. Witness, &c. And when through the extent the value has been ascertained, then for the first time let it be enjoined to the viscount where the warrantor has land, that he take into the hand of the lord the king up to the value through a writ of this kind.

5. A writ for taking land for default.

The king to the viscount greeting. Take into our hand by the view, &c. of the land of so-and-so through the default of the said so-and-so up to the value of one hundred shillingsworths of land for one carucate of land with its appurtenances in such a vill in such a county, which so-and-so in our court, &c., claims as his right against such a person, and whereof such said

versus talem, et unde idem talis vocaverit &c. et diem &c. et sum̄oneas talem q̄ sit ad talem diem &c. Teste &c. Quandoquè tamen sine tali inquisitione facienda, estimetur terra quæ petita est secundam solam assertionem petentis, et capiatur in alio comitatu ad valentiam, ut si tenens retinuerit, non erit necesse ulteriùs p̄cedere, si autem amiserit, tunc procedatur ad veram inquisitionem, quod prius non erit necesse, ut de term̄ Paschæ añ regis Henrici decimo quarto.

6. Si de advocatione ecclesiæ vocetur warrantus, tunc capiatur terra ad valentiam et estimetur advocatio, ut sciri possit quantum capi debeat.

Cûm petatur advocatio et tenens warrantum vocaverit, qui defaltam fecerit, tunc de terra warranti capiatur ad valentiam in manum domini regis, sive warrantus manens fuerit in eodem comitatu, sive in diversis. Sed quoniam incertum erit quantū capi debeat de terra warranti, nisi prius constiterit de valore advocationis, inprimis estimanda erit ecclesia, et per consequens sciri poterit quantū valeat advocatio. Extensio quidem advocationum talis esse debet in partitionibus faciendis inter cohæredes, q̄ si ecclesia valeat viginti marc., plus vel minus, p̄ qualibet marca in extensione facienda computetur redditus duodecim denariorˉ, sicuti p̄ viginti marc. viginti solidˉ, et facta sic extensione, capiatur p̄ defalta warranti ad valentiam per hoc breve.

7. Breve quod capiat tantum terræ quæ sit de hæreditate.

Rex vicecom̄ salutē. Cape in manum nostram per visum &c. de terra talis mulieris in balliva tua, q̃ sit de hæreditate ejus, cùm forte aliam terram habuerit simul cum hæreditate, sicut nomine dotis, pro defectu ipsius mulieris, ad valentiam viginti solidatarum redditus cum pertinentiis pro advocatione talis ecclesiæ

person has vouched, &c., and the day, &c., and summon so-and-so that he be present on such a day, &c. Witness, &c. Sometimes without making such an inquest, let the land which is claimed be estimated according to the simple assertion of the claimant, and let there be taken in another county up to the value, and if the tenant has retained it, it will not be necessary to proceed any further, but if he has lost, then let proceedings be had to a true inquest, which before was not necessary, as in Easter term in the fourteenth year of king Henry.

6. If a warrantor be vouched concerning the advowson of a church, then let land be taken up to the value, and let the advowson be estimated, that it may be known how much ought to be taken.

When an advowson is claimed and the tenant has vouched a warrantor who has made default, then let there be taken of the land of the warrantor into the hand of the lord the king up to the value, whether the warrantor is resident in the county or in different counties. But since it will be uncertain how much ought to be taken of the land of the warrantor, unless an estimate has first been made of the value of the advowson, in the first place the church will have to be estimated, and as a consequence it will be possible to know how much the advowson is worth. An extension of advowsons ought to be of this kind in making partitions amongst coheiresses, that if the church is worth twenty marks, more or less, for each mark in making the extension a rent of twelve pennies should be computed, as for instance, for twenty marks twenty shillings, and the extension having been so made, let there be taken for the default of the warrantor up to the value by a writ of this kind.

7. A writ for taking so much land, which is part of the inheritance.

The king to the viscount greeting. Take into our hand by a view, &c. of the land of such a woman in your bailiwick, which is of her inheritance, if perchance she should have other land besides her inheritance, as in the name of dower, for the default of the said woman, up to the value of twenty shillings of rent with the appurtenances for the advowson of such a

quam A. in curia nostra &c. clamat ut jus suum
f. 385. versus B. Et unde idē B. in eadē curia vocavit ipsam ad warrantū versus p̄dictū A. et diem &c. Sum̄oneas &c. Teste &c. Cùm autē mulier dotē petierit vel aliud tenementū, vel quid tale, ut jus suū versus aliqm, qui minorem vocaverit ad warrantū, si minor vel ejus custos defaltam fecerit, ubicunq̄ terra fuerit, habita tamē extensione (ut prædictū est) capiatur de terra minoris pro defectu custodis ad valentiam terræ petitæ per tale breve.

8. Si mulier dotem petierit et minor vocatus ad warrantum et custos defaltam fecerit, capiatur de terra minoris pro defectu custodis.

Rex vicecom̄ salutē. Cape in manū nostrā p̄ visum &c. de terra talis filii & hæredis talis qui est infra ætatē et in custodia talis pro defectu ipsius custodis ad valentiā tantæ terræ cum pertinentiis, vel tertiæ partis tantæ terræ cum pertinētiis in tali villa, vel in com̄ tali, quam tertiam p̄tem, talis, quæ fuit uxor talis, in curia nostra &c. clamat in dotem versus A., & unde idem A. in eadem curia nostra coram &c. vocavit eundē talem qui est infra ætatem ad warrantum versus eum et diē &c. sum̄oneas &c. Teste &c.

9. Si minor vocatus fuerit ad warrantum cum parastre, et uterque eorum defaltam fecerit, vel alter eorum tantum, capia-

Si autem vocatus fuerit ad warrantum (ut p̄dictum est) ille, qui nihil habuerit de hæreditate materna, nec sine parastre respondere poterit, sive uterq̄ defaltam fecerit sive alter ipsorū, capiatur de hæreditate materna ad valentiā terræ petitæ p̄ defaltam per tale breve. Sed[1] refert utrum per parvum cape vel per magnum, cùm unus in curia cōparuerit & alius nō. Sed videtur q̄ per magnū, ubi ambo defaltam fecerint, cùm ipse qui in curia cōparuerit se defendere possit

[1] "Sed refert utrum." The passage so commencing down to "quasi custos est," seems to be an interpolation, and it is not found in MS. Rawl. C. 160.

church, which A. claims in our court as his right against B. And whereof the said B. in the same court has vouched her to warrant against the aforesaid A., and the day, &c. Summon, &c. Witness, &c. But when the woman has claimed her dower, or another tenement, or something of the like sort against some one, who has vouched a minor to warrant, if the minor or his guardian has made default, wherever the land may be, after an extension however has been made (as aforesaid), let there be taken of the land of the minor for the default of the guardian up to the value of the land claimed by a writ of this kind. f. 385.

8. If the woman has claimed dower and the minor summoned to warrant and the guardian have made default, let there be taken of the land of the minor for the default of the guardian.

The king to the viscount greeting. Take into our hand by a view, &c. of the land of such an one, the son and heir of so-and-so, who is under age and is in the wardship of so-and-so, for the default of the said guardian up to the value of so much land with its appurtenances, or of the third part of so much land with its appurtenances in such a vill, or in such a county, which third part so-and-so, who was the wife of so-and-so, claims in our court, &c. as her dower against A., and whereof the said A. in our said court before, &c. has called the said so-and-so, who is under age, to warrant against him, and the day, &c. Summon, &c. Witness, &c.

9. If a minor be vouched to warrant with his stepfather, and each of them has made default, or the one or the other of them only, let there be taken of the land of the minor

But if a person has been vouched to warrant (as aforesaid) who has had nothing of his maternal inheritance, and who cannot answer without his step-father, whether each of them has made default or the one or the other only of them, let there be taken of the maternal inheritance up to the value of the land claimed through the default by a writ of this kind. But it matters whether by a little *cape* or a great *cape*, when one has appeared in court and the other not. But it seems by a great *cape*, when both have made default, since he who has appeared in court may defend himself by his law, and since odious proceedings are to be re-

tur de terra minoris ad valentiam terræ petitæ.

per legem, & cûm sint odiosa restringenda. Cùm autē unus eorum tantum defaltam fecerit, tunc utrum sit vel sic, certū erit q terra hæredis. Si autem unus sit custos terræ et hæredis simul, vel unus custos terræ & alius custos hæredis, in quo casu ultimo, omnes sum̄onendi sunt in uno brevi quotquot sunt custodes & habeant hæredē. Si autē paraster, per legē Angliæ quasi custos est. Rex vicecom̃ salutē. Cape in manum nostrā per visum &c. de terra quam A. tenet ad vitam suam per legem Angliæ & quæ est de hæreditate B. filii & hæredis talis mulieris, & ad ipsum reverti debet post mortem prædicti A. ad valentiam tantæ terræ cum pertinentiis in p̃dicta villa, quam C. in curia nostra &c. clamat ut jus suum versus D. Et unde idem D. in eadem curia nostra &c. vocavit inde ad warrantū p̃dictum A. simul cum prædicto B. versus eundē C. & q idem B. dicebat quòd nihil tenuit de hæreditate prædicta matris suæ, sed prædictus A. per legem Angliæ, sine quo de prædicta warrantia non potuit respondere & diem &c. et summoneas &c. Teste &c.

10. Si plures warranti defaltam fecerint.

Quod autem de uno warranto dicitur, dici potest de pluribus, si plures defaltam fecerint, secundum quod terras habuerint in uno com̃ vel diversis, & ubi, si in diversis com̃, sum̄oneantur sic. Rex vicecom̃ salutem. Sum̄oneas p bonos sum̄onitores A. quòd sit coram justic. &c. ad warrantizādum B. de N. simul cū C. de tali com̃ tantū terræ cū ptinentiis in tali villa &c. ut supra. Et sic de tribus vel pluribus warrantis, et si omnes defaltā fecerint, de terris omniū capietur ad valentiā, secundū q tenuerint p diviso vel p indiviso, & factā extensione, secundū q fuerint omnes in uno com̃ vel diversis.

strained. But when one of them only has made default, then whether it be in this way or in that, it will be certain that the land of the heir is to be taken. But if one person be the guardian of the land and of the heir jointly, or one the guardian of the land and the other the guardian of the heir, in which last case all are to be summoned in one writ, however many may be the guardians, and let them produce the heir. But if there be a step-father, he is by the law of England as it were, the guardian. The king to the viscount greeting. Take into our hand by a view, &c. of the land, which A. holds for his life by the law of England, and which is of the inheritance of B. the son and heir of such a woman, and ought to revert to him after the death of the said A., up to the value of so much land with its appurtenances in the aforesaid vill, which C. in our court, &c. claims as his right against D. And whereof the said D. in our said court, &c. has vouched thereon to warrant the aforesaid A. together with the aforesaid B. against the said C. and because the said B. has said that he held nothing of the inheritance of his said mother, but the aforesaid A. by the law of England, without whom he could not answer concerning the said warranty, and the day, &c., and summon, &c. Witness, &c.

up to the value of the land claimed.

But what has been said of one warrantor may be said of several, if several have made default, according as they may have lands in one county or in divers counties, and when, if they have land in divers counties, let them be summoned thus. The king to the viscount greeting. Summon by good summoners A. that he should appear before our justiciaries &c. to warrant to B. of N. together with C. of such a county so much land with its appurtenances in such a vill &c. as above. And so of three or more warrantors, and if they have all made default, let there be taken of the lands of all up to the value, according as they may hold their land divided or undivided.

10. If several warrantors have made default.

11. Si warranti ma- f. 385 b. nentes fuerint in diversis comitatibus, et pro ea parte, quam quilibet tenuerit, facta prius estimatione.

Si autē unus ex pluribus warrantis defaltam fecerit ante apparationem, & alii comparuerint, absentia unius non erit dānosa aliis, q̄ nō est in viro et uxore, sed illi qui p̄sentes fuerint defendant causam suam, sed p̄ defectu absentis capiatur de terra ipsius in manu dñi regis ad valentiā pro ea parte, q̄ ipsum cōtigerit de warrantia facienda, facta tamen priûs estimatione quantū valeat terra q̄ petita est à tenēte, & fiat tale br̄e. Rex vicecom̄ salutē. Cape in manū nr̄am (per omnia ut supra) usq̄ ad clausulam illam, scilicet: Et unde talis in eadē curia vocavit talē ad warrantum versus talē petentē cū A. B. C. cohæredibus & p̄ticipibus suis. Teste &c. Et si talis ad secundū diē nō venerit, amittet terrā suā captā in manū dñi regis p̄ juditiū, et salvæ erunt aliis exceptiones & responsiones suæ.

Cap. VI.

1. Si warrantus ad secundam summonitionem post captionem nec primo die nec quarto nec secundo nec tertio comparuerit.

Cum autem warrantus ad secundū sum̄onitionē post captionē nec primo die, nec secundo, nec tertio, nec quarto cōparuerit, petente se offerente liti contra tenentem, et tenente contra warrantū, recuperabit petens terram versus tenentē, et tenens versus warrantum excambiū ad valentiam. Et fiat talis irrotulatio, A. petit versus B. tantā terrā cum p̄tinentiis in tali villa ut jus suum, et ita q̄ p̄dictus B. venit in eadē curia nostra et vocavit inde ad warrantum C. ita q̄ sum̄onitus fuit q̄ esset ad talem diem, ad quem diē non venit nec se essoniavit, & ita de terra ipsius C. per juditium

But if one out of several warrantors has made default before the appearance, and the others have appeared, the absence of the one will not be hurtful to the others, which is not so in the case of husband and wife, but let those who are present defend their own cause, but as regards the default of the absentee, let there be taken of his land into the hand of the lord the king up to the value in proportion to that part which belongs to him in respect of the warranty to be made, an estimate however having been previously made as to how much the land is worth, which is claimed from the tenant, and let a writ of this kind go. The king to the viscount greeting. Take into your hand (throughout as above) up to that clause, to wit; and whereof so-and-so in the said court has called such person to warrant against so-and-so the claimant with A. B. C. coheiresses and his parceners. Witness &c. And if such person shall not have come on the second day, he shall lose his land taken into the hand of the king by a judgment, and there shall be reserved to the others their exceptions and their answers.

11. If the warrantors are f. 385 b. resident in different counties, and for that part, which each may hold, an extension having been first made.

Chapter VI.

But when the warrantor on the second summons after the caption has not appeared, neither on the first, nor on the second, nor on the third, nor on the fourth day, the claimant presenting himself to join issue with the tenant, and the tenant to join issue with the warrantor, the claimant shall recover the land against the tenant, and the tenant shall recover against the warrantor compensation in land up to the value. And let the enrolment be of this kind, A. claims against B. so much land with its appurtenances in such a vill as his right, and so that the aforesaid B. has come into our court and has vouched thereon C. to warrant, so that he was summoned to present himself on a certain day, on which day he neither came nor essoined himself, and so of the land of C. him-

1. If the warrantor upon the second summons after the caption has not appeared on the first, nor on the second, nor on the third, nor on the fourth day.

capta fuit in manum domini regis ad valentiam p̃dictæ terræ. Et præceptum fuit vic. quòd mandaret justic. diem captionis, & q̃ iterum sum̃oneret prædictā D. q̃ esset ad talē diem responsurus de principali placito, et de defalta. Et ad quem diem non venit, nec primo, nec secundo, nec tertio, nec quarto die, nec terra ad horam fuit replegiata, et ideo cōsiderandum est q̃ prædictus A. recuperet terram suam versus predictum B. per defaltam B., et B. in misericordia, et habeat de terra ipsius C. in loco competenti excambiū ad valentiam. Et quod dictū est de uno warranto, dici possit de pluribus si defaltam fecerint. Breve de faciendo seysinā petenti tale erit.

2. Quod petens recuperabit seysinam per defaltam.

Rex vic. salutem. Scias q̃ A. in curia nr̃a corā justic. &c. recuperavit seysinā suā versus B. per defaltā ipsius B. de tāta terra cum p̃tinētiis in tali villa. Et ideo tibi p̃cipimus, q̃ eidē A. de p̃dicta terra cum p̃tinētiis sine dilatione plenariā seysinam habere facias T. &c. Post breve istud fiat aliud tenenti de escambio habendo facta prius extēsione ut supradictū est, si warrātus terrā nō habuerit in eodē com̃ sed in in diversis. Si autē in eodem com̃, tunc fiat breve sic.

f. 386.

3. Cum tenens amiserit, quia warrantus non potest eum defendere in seysina

Rex vic. salutē. Scias q̃ cùm A. de N. in curia nostra corā justic. &c. peteret versus B. tantam terram cum pertinentiis in tali villa ut jus suum, idem B. venit in eadem curia nostra coram eisdē justic. et vocavit inde ad warrantū E. de N., qui cùm sum̃onitus esset, postea defaltam fecit in eadē curia, per q̃m idem

self there was taken by a judgment into the hand of the lord the king up to the value of the aforesaid land. And it was enjoined to the viscount, that he should send to the justiciaries the day of the caption, and that he should summon a second time the aforesaid D. that he should be present on a certain day in order to answer concerning the principal plea and concerning the default: and on which day he has not appeared, neither on the first, nor on the second, nor on the third, nor on the fourth day, nor was the land replevined at the hour, and accordingly it was resolved that the aforesaid A. should recover his land against the aforesaid B. through the default of B., and B. should be amerced, and should have of the land of the said C. in a suitable place compensation up to the value. And what has been said of one warrantor may be said of several, if they have made default. The writ of giving seysine to the claimant will be of this kind.

2. That the claimant shall recover seysine by default.

The king to the viscount greeting. Know that A. in our court before our justiciaries &c. has recovered his seysine against B. through the default of the said B. of so much land with its appurtenances in such a vill. And accordingly we enjoin you that you cause the said A. to have plenary seysine without delay of the said land with its appurtenances. Witness &c. After that writ let another writ be issued to the tenant concerning the making compensation, an extent having first been made as said above, if the warrantor has not land in the same county, but in divers counties. But if in the same county, then let a writ issue of this kind. f. 386.

3. When the tenant has lost because the warrantor cannot maintain him in his seysine, if the war-

The king to the viscount greeting. Know that, when A. de N. in our court before our justiciaries &c. has claimed against B. so much land with its appurtenances in such a vill as his right, the said B. came into our said court before our said justiciaries and vouched thereon to warrant E. de N., who when he was summoned afterwards made default in the said court, whereby the said A. has

sua, si warrantus tenementum habuerit in eodem comitatu, statim fiat ei excambium ad valentiam.

A. seysinā suā recuperaverit de p̄dicta terra versus eundem B. Et ideo tibi p̄cipimus quòd de terra ipsius E. in com̄ tuo propinquiore tali terræ ipsius B. eidē B. excambiū ad valētiam sine dilatione habere facias. T. &c. Cùm autē plures sint warranti vocati & quidam illorum defaltam fecerint et quidam nō, tunc fiat breve in hac forma.

4. Si plures sint warranti, et quidam defaltam fecerint et quidam non.

Rex vic. salutē. Scias q, cùm A. in curia nostra &c. (ut supra), idem B. venit (ut supra) et vocavit inde ad warrantū C. & D. qui cûm sum̄oniti essent in eadē curia nostra coram p̄fatis justic. nostris, idē C. defaltam fecit versus eundem B. ita q p̄dictus A. coram p̄fatis justic. &c. recuperavit seysinā suā versus eūdē B. p defaltā de medietate totius terræ cum ptinentiis. Et ideo tibi p̄cipimus q de terra ipsius C. in balliva tua ppinquiore terræ ipsius B. escābiū ad valētiam p̄dictæ medietatis eidē B. sine dilatione habere facias. Teste &c. Si post sum̄onitiones & essonia cū tenēs se forte essoniaverit & warrātus cōparuerit vel quidā ex pluribus, & sic diem in banco habuerint & postea defaltam fecerint, capiatur de terra ipsorū &c. et fiat talis irrotulatio. Si autē cōtingat quòd warrantus semel post sum̄onitionem vel essonium suum factum, cū tenēs se forte essoniaverit, in juditio comparuerit, vel cùm plures warranti vocati fuerint simul vel vicissim se essoniaverint, quidam illorū in juditio cōparuerint, & sic diē habuerint in banco, et postea defaltam fecerint, capiatur de terra illorum p defaltā ad valentiam terræ petitæ, vel ptis ipsius, secundū quòd plures warrāti vocati fuerint vel unus, per parvū cape in forma superius dicta, de petente et

recovered his seysine of the aforesaid land against the said B. And accordingly we enjoin you that of the land of the said E. in your county which is next to the said land of the said B. you cause compensation to be made to the said B. up to the value without delay. Witness, &c. But when several warrantors have been called, and some of them have made default and some not, then let a writ be issued in this form.

rantor has a tenement in the same county, let there be forthwith made compensation up to the value.

4. If there be several warrantors, and some have made default and others not.

The king to the viscount greeting. Know that, when A. in our court as above, the said B. came (as above) and vouched thereon to warrant C. and D., who when they were summoned in our said court before our justiciaries aforesaid, the said C. made default towards the said B., so that the aforesaid A. before our justiciaries aforesaid, &c. recovered his seysine against the said B. by default of the mediety of the said land with its appurtenances. And accordingly we enjoin you that of the land of the said C. in your bailiwick, which is nearest to the land of the said B., you cause the said B. to receive compensation up to the value of the said mediety without delay. Witness, &c. If after the summons and the essoins, when the tenant has by chance essoined himself and the warrantor has appeared, or some out of several, and so they have had a day at the Bench, and have afterwards made default, let there be taken of their lands, &c., and let there be an enrolment of this kind. But if it happens that the warrantor has appeared in judgment once after the summons or after his essoin, when the tenant by chance has essoined himself, or when several warrantors have been vouched and have essoined themselves together or in turns, some of them have appeared in judgment, and so had a day at the Bench, and afterwards have made default, let there be taken of their land for the default up to the value of the land claimed or of the part itself, according as several or one warrantor have been called, by a little *cape* in the form above said, concern-

tenente, cùm tenens defaltam fecerit postqm semel in juditio cōparuerit, et fiat sic irrotulatio in persona warrāti, B. optulit se quarto die versus C. de placito q warrantizet ei tantam terram cum ptinentiis in tali villa, quam A. de N. in curia &c. clamat ut jus suū versus eundē C. vel quam talis mulier clamat ut dotem suam versus eundem B. et unde idē B. in curia nostra vocavit &c. (ut supra), et idem C. non venit, et habuit diem in banco postquàm comparuerat in curia nostra &c. juditium &c. Capiatur de terra ipsius C. ad valentiam, et ipse C. sum̄oneatur quòd sit ad talem diem auditurus juditium suum per parvum cape quod tale est.

5. Cape de terra warranti ad valentiam.

Rex vic. salutē. Cape in manū nostram de terra C. in balliva tua pro defectu ipsius C. ad valentiam tantæ terræ cum pertinentiis suis in tali villa qm A. de N. in curia nostra &c. coram justic. &c. clamat ut jus suū versus B. et unde idem B. in eadem curia nostra coram justic. &c. vocavit ipsum C. ad warrantum versus predictum A. et summoneas per bonos sum̄onitores prædictum C. q sit coram justic. nostris ad talem diem auditurus inde juditium suum, et habeas ibi sum̄onitores et hoc breve. T. &c.

f. 386 b.

6. Aliud breve de eadem captione, sed alio modo.

Ad q̄m diem si non venerit, amittet ad valentiam terræ petitæ p defaltam versus D. qui tenet, et A. recuperabit versus B. terram petitā, & fiat talis irrotulatio, A. optulit se quarto die versus C. de placito q warrantizet ei tantam terram cum pertinentiis in tali villa, quam A. clamat &c. (ut supra) versus B. & unde

ing the claimant and the tenant, when the tenant has made default after he has once appeared in judgment, and let the enrolment be made thus in the person of the warrantor. B. has presented himself on the fourth day against C. concerning a plea that he should warrant to him so much land with its appurtenances in such a vill, which A. de N. in our court, &c. claims as his right against the said C., and which such a woman claims as her dower against the said B., and whereof the said B. in our court has vouched, &c. (as above), and the said C. has not come and has had a day in the Bench after he had appeared in our court, &c. Judgment, &c. Let there be taken of the land of the said C. up to the value, and let C. himself be summoned that he be present on such a day in order to hear his judgment by a little *cape*, which is of this kind.

5. A cape of the land of the warrantor up to the value.

The king to the viscount greeting. Take into our hand of the land of C. in your bailiwick for the default of the said C. up to the value of so much land with its appurtenances in such a vill, which A. de N. in our court, &c. before our justiciaries, &c. claims as his right against B., and whereof the said B. in our said court before our justiciaries, &c. has vouched the said C. to warrant against the aforesaid A., and summon by good summoners the aforesaid C. that he be present before our justiciaries at a certain day in order to hear thereupon his judgment, and have there the summoners and this writ. Witness, &c.

f. 386 b

6. Another writ for the same caption, but in a different manner.

At which day, if he has not come, he shall lose up to the value of the land claimed through his default towards D. who holds it, and A. shall recover against B. the land claimed, and let there be an enrolment of this kind: A. has presented himself on the fourth day against C. concerning a plea that he should warrant to him so much land with its appurtenances in such a vill, which A. claims, &c. (as above) against B., and

idem B. vocavit ad warrantum ipsum C. et C. non venit sed aliàs fecit defaltam postquam in curia comparuerat, ita q̄ terra capta fuit in manum dñi regis, et ipse C. sum̄onitus ad audiendum juditium suum. Et ideo consideratum est q̄ A. recuperet seysinam suam versus B. et B. in misericordia, et habeat excambium ad valentiam de terra ipsius C. et fiat utriq̄ eorum seysina, scilicet A. de re petita et B. de eschambio in forma supradicta. Si Christianus[1] vel Judæus qui terrā nō habuerint de qua distringi possint cùm vocati fuerint ad warrantizandum, præcipiatur vicecom̃ q̄ habeat corpora eorum, quia ibi non poterit captio terre fieri ad valentiam. Judæus vero nihil ꝑprium habere potest, quia quicquid acquirit non sibi acquirit sed regi, quia non vivunt sibi ipsis sed aliis, et sic aliis acquirunt et nō sibi ipsis.

Cf. Liber de Antiquis Legibus, a° 1270.

7. De viro et uxore, cum simul vocati fuerint ad warrantum, et alter ipsorum defaltam fecerit.

Quid autem dicetur de viro et uxore cùm simul vocati fuerint ad warrātum, et unus illorum defaltā fecerit, tunc fiat ac si uterq̄ defaltam faceret, vel per parvum cape vel per magnum cape, secundū q̄ defalta facta fuerit antequam cōparuerint vel post. Sed cùm vicissim se essoniaverint, et unus diem in banco receperit cùm alius se essoniaverit et postqm ambo defaltam fecerint, tunc pro defectu utriusq̄ capienda erit terra in manū dñi regis. Sed refert utrum per parvum cape vel per magnum cape, quia ratione ejus qui non comparuerit videtur, q̄ locum habet magnum cape, et ratione ejus qui cōparuerit, q̄ parvum locum habebit. Sed cûm sint loco unius nec jura eorū divisionē recipiunt, nec utrūq̄ b̄re simul cōpetere possit,

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[1] *Si Christianus vel Judæus.* This passage down to "sibi ipsis," is omitted in MSS. Rawlinson C. 159 and 160, and in various other MSS. See Introduction.

whereof the said B. has vouched to warrant the said C., and C. has not come but otherwise has made default after he had appeared in court, so that the land was taken into the hand of the lord the king, and the said C. was summoned to hear his judgment. And accordingly it was resolved that A. should recover his seysine against B. and B. should be amerced, and should have compensation up to the value of the land of the said C., and let seysine be made to each of them, to wit, to A. of the thing claimed, and to B. of the compensation in the form above said. If a Christian or a Jew, who has no land upon which a distress may be made, when they have been vouched to a warranty, let it be enjoined to the viscount that he seize their persons, because there cannot be there made a caption of land up to the value. But a Jew cannot have anything of his own, because whatever he acquires, he acquires not for himself but for the king, because they do not live for themselves but for others, and so they acquire for others and not for themselves.

7. Of a husband and wife, when they have been vouched together to warrant, and one or other of them has made default.

But what shall be said of a husband and wife when they have been vouched together to warrant, and one of them has made default, then let it be done as if both of them had made default, either by a little *Cape* or by a great *Cape*, according as the default has been made before they have appeared or afterwards. But when they have essoined themselves in turns and one has received a day at the Bench, when the other has essoined himself, and after both have made default, then on account of the default of both the land will have to be taken into the hand of the lord the king. But it matters whether by a little *Cape* or a great *Cape*, because in regard of him who has not appeared it seems that the great *Cape* has place; and in regard of him who has appeared, that the little *Cape* will have place. But since they are in the place of one person nor do their rights admit of division, nor can both writs be applied

si ad juris rigorē habeatur respectus, et cûm lites restringēdæ sunt et ea tenenda quæ magis ligant, tunc ad parvum cape erit recurrendū, si autē ad ptem benigniorē ubi defendi possunt sum̄onitiones, sursisæ, et essonia, tunc locum habebit magnum cape, q̄ melius est. Cùm autem unus illorum defaltam fecerit, in hoc casu fiat magnum cape vel parvum, secundum q̄ ille qui defaltam fecerit in juditio prius cōparuerit vel non.

8. Cum warrantus nullam habeat excusationem, cum defaltam fecerit primo die, secundo, tertio, vel quarto.

Cùm autem warrantus nullam habuerit excusationem cùm venerit, quam prætendere possit et sanare defaltam q̄ ad primū diē non venerit, nec secundum, nec tertiū, nec quartum: tunc fiat irrotulatio sic: A. petiit versus B. tantū terræ cum pertinentiis, et ita q̄ idē B. vocavit ad warrantum C. qui postquàm in curia cōparuerit et diē habuerit in bāco, vel postq̄m warrātizavit defaltā fecit, ita q̄ terra capta fuit in manū dñi regis, et ipse sum̄onit[2] ad audiēdū juditiū suum ad hunc diē. Et ipse C. venit sed nō potuit sanare defaltā, et ideo cōsideratū est q̄ A. recuperet seysinā suā versus B. et B. in misericordia, et habeat excābiū ad valentiam de terra ipsius C. Breve de faciendo seysinam ipsi A. tale est.

9. Breve secundum judicium prædictum. f. 387.

Rex vicecom̄ salutem. Scias quòd cûm A. in cùria nostra &c. peteret versus B. tantam terram &c. ut jus suum, vel mulier ut dotem suam, vel aliud secundum formam brevis originalis, idem B. venit in eadem curia coram eisdē justic. &c. et vocavit inde ad warrantū C. & qui similiter venit in eadē curia, et eidem B. terrā illā warrantizavit, et postea in eadē curia nostra terrā illā amisit per defaltam quam fecit versus

together, if regard is to be had to the rigour of the law, and since litigation is to be restrained and those things are to be maintained which are most binding, then recourse will have to be had to the little *Cape*; but if to the more benignant part, where summonses, adjournments, and essoins may be maintained, then a great *Cape* shall apply, which is better. But when one of them has made default, in their case let either a *great Cape* or a little *Cape* be employed, according as he who has made default has appeared in judgment previously or not.

8. When a warrantor has no excuse, when he has made default on the first, the second, the third, or the fourth day.

But when the warrantor has no excuse when he has come, which he can hold out and cure his default that he has not come on the first day, nor on the second, nor on the third, nor on the fourth, then let the enrolment be thus, A. has claimed against B. so much land with its appurtenances, and so that B. has vouched C. to warrant, who when he has appeared in court and has had a day at the Bench or after he has warranted has made default, so that the land was seized into the hand of the lord the king, and he was himself summoned to hear his judgment on this day. And the said C. has come, but could not cure his default, and therefore it was resolved that A. should recover his seysine against B., and B. should be amerced and have compensation up to the value from the land of the said C. The writ to give seysine to the said A. is of this kind.

9. A writ according to the judgment aforesaid. f. 387

The king to the viscount greeting. Know that when A. in our court, &c. claimed against B. so much land, &c. as his right, or a woman as her dower, or something else according to the form of the original writ, the said B. appeared in the said court before our said justiciaries and vouched C. to warrant thereon, and who appeared in like manner in our court, and warranted to the said B. that land, and afterwards in our said court lost that land through a default which he made towards

eundem A. Et ideo tibi p̃cipimus q̃ eidem A. de prædicta terra cum pertinentiis sine dilatione plenariam seisinam habere facias, & de terra ipsius C. in balliva tua habere facias eidem B. escambium ad valentiam prædictæ terræ sine dilatione per visum legalium hominum. Teste &c.

10. Quod potest quis amittere per defaltam, quam fecit primo die, sicut secundo, tertio et quarto.

Et quòd quis amittere poterit per defaltam, quam fecerit ad primum diem, hoc est si primo die non cõparuerit, ac si secundo die, tertio vel quarto defaltam fecerit, si sum̃onitionẽ cognoverit vel si eam dedicere nõ possit, cùm diẽ habuerit in bãco postq̃m semel in curia cõparuerit: p̱batur de term̃ S. Michaelis anno regis H. xvi. incipiente xvii. in com̃ Midd̃ de W. de Ralegh et quodã tenente suo Johanne Pigon, qui tenuit de quadam p̃benda S. P. Et etiam quòd defalta facta primo die, et secundo die placiti nocet, p̱batur de term̃ S. Hilarii anno regis H. viii. in com̃ Berk. de Henry de Queynt qui se tenuit ad defaltam, quia tenens non venit primo die, nec secundo, sed postea remisit tenenti defaltam p̱ xv. marc. argenti. Sed quid si primo die cõparuerit tenens coram aliquo justiciario, et secundo, tertio, vel quarto die defaltam fecerit? idem erit dicendũ q̃ prius, cûm vocatus non cõparuerit. Et eodem modo si uno die de licentia absens fuerit & per alium diem se absentaverit sine licentia. Et notandum, quòd si quis implacitatus sit per breve de recto et per defaltã amiserit, vix seysinam suam rehabebit per consimile breve, nisi majus jus habuerit in t̃ra illa petita ille qui amisit, quàm ille qui petit. Si autem minus vel nihil, nunquam recuperabit, sicut esse posset inter fratrem antenatum et postnatum, si postnatus per defaltam amitteret.

the said A. And accordingly we enjoin you that you cause the said A. to have without delay plenary seysine of the said land with its appurtenances, and of the land of the said C. in your bailiwick you cause the said B. to have compensation up to the value of the aforesaid land without delay by the view of loyal men. Witness, &c.

10. That a person may lose by a default which he has made on the first day, as on the second, the third, and the fourth.

And that a person may lose by a default which he has made on the first day, that is if he has not appeared on the first day, and if on the second day, on the third, or on the fourth he has made default, if he has known of the summons, or if he cannot gainsay it, when he has had a day in the Bench after he has once appeared in the court, is proved in St. Michael's term concerning William de Ralegh and a certain tenant of his John Pigon, who held of a certain prebend S. P. And also that default made on the first day, and on the second day of the plea is hurtful, is proved from Hilary term in the eighth year of king Henry in the county of Berks, concerning Henry de Queynt, who kept himself to the default, because the tenant did not come on the first day nor on the second, but afterwards he remitted the default to the tenant for fifteen marks of silver. But what if the tenant has appeared before a justiciary and on the second, third, or fourth day has made default? the same will have to be said as before, when a vouchee has not appeared. And in the same manner if on one day he has been absent by leave, and on another day he has absented himself without leave. And it is to be noted, that if a person has been impleaded through a writ of right and has lost by default, he will scarcely recover his seysine by a similar writ, unless he who has lost has a greater right in the land claimed than he who claims. But if he has less or no right he will never recover, as may happen between a first-born and an after-born brother.

11. Ubi quietus recedit de warrantia et terra petita capiatur in manum domini regis.

Sed quid si tenens defaltam fecerit cùm petens p̃sens sit et warrantus, illis se liti offerentibus, si warrantus nondum warrantizavit, statim recedat quietus de warrantia, et terra petita capiatur in manum dñi regis per parvum cape, & tenens summoneatur q̃ sit ad alium diem auditurus inde juditium suum, ad quem diem si non venerit, vel si cùm venerit sanare non possit defaltam, amittet seysinam suam, eo quòd non est secutus versus warrantum suum, quem vocavit per auxilium curię vel sine. Et de hac materia inveniri poterit de terḿ S. Michaelis anno regis H. quarto incipiente quinto.

12. Si petens defaltam fecerit offerentibus se liti quarto die tenente et warranto, uterque quietus recedet.

Cûm autem petens defaltam fecerit offerentibus se liti quarto die tenente & warranto, recedet uterque quietus de brevi illo.

13. Si warrantus Christianus vel Judæus terram non habuerint, per quam distringi possunt ad warrantum, vicecomes habeat corpora eorum.

Cùm quis ad warrantum vocatus fuerit Christianus vel, Judæus, qui terram non tenuerit in feodo, q̃ capi possit in manum dñi regis vel per quam distringi possunt, præcipiatur vicecomiti q̃ habeat corpora eorum primo die. Et de hac materia inveniri poterit de terḿ S. Trinitatis anno regis H. quarto de Isaac Judæo de Northwico, & de terḿ S. Hilarii & Paschæ circa principium.

But what, if the tenant has made default, when the claimant is present and the warrantor, they offering to join issue, if the warrantor has not yet warranted, let him withdraw forthwith released from his warranty, and let the land claimed be taken into the hand of the lord the king by a little *Cape*, and let the tenant be summoned that he be present on another day to hear judgment thereon, on which day if he shall not have appeared, or if, when he has appeared, he cannot cure his default, he shall lose his seysine, inasmuch as he has not sued his warrantor whom he vouched either with the help of the court or without it. And on this matter a case will be found in St. Michael's term in the fourth and fifth years of king Henry.

11. Where a person withdraws released from a warranty, and the land claimed is taken into the hand of the king.

But when the claimant has made default when the tenant and the warrantor present themselves on the fourth day to join issue, both of them shall withdraw released from that writ.

12. If the claimant has made default, when the tenant and the warrantor are present on the fourth day to join issue, let both of them withdraw released.

When a person, who has been vouched to warrant, is a Christian or a Jew, and has no land in fee, which can be taken into the hand of the lord the king, or upon which a distress can be made, let it be enjoined to the viscount that he present their persons on the first day. And on this matter a case will be found in Holy Trinity term in the fourth year of king Henry, concerning Isaac the Jew of Norwich, and in Hilary and in Easter term about the beginning.

13. If a Christian or Jewish warrantor have no land, through which a distress can be made for a warranty, let the viscount present them in person.

Cap. VII.

f. 387 b.

1. Post essonia et dilationes præsentibus in judicio petentibus[1] et warranto, si warrantus gratis warrantizaverit et in se susceperit defensiones, tunc remaneat tenens, donec discussum fuerit inter petentem et warrantum.

Post essonia et districtiones et dilationes legitimas p̃sentibus in juditio tam petente quàm tenente et warranto, aut statim warrantizat aut de warrātia cōtēdit q̈ warrantizare nō debeat. Si autē sine contētione gratis warrātizaverit et in se defensiōes susceperit in placito principali, incipiet placitū esse principale inter petentē et ipsum warrantū, et ex tunc remaneat tenens cui warrātizatū est domi, donec cōstiterit quis eorū, petētis vel warranti, possit in placito obtinere, et p̈ponat petens intētionem suam versus warrantū sicut primò p̈posuit versus ipsū tenentē, quia de cætero p̈cedant omnia sub psona warranti sicut p̈cedere deberet sub psona tenentis, nec poterit de cætero tenēs pdere, quia si warrantus ipsū in seysina sua defendere nō possit, habebit tenēs de terra warranti, si q̈m habuerit, escambiū ad valentiā ĩræ q̈m tenēs amiserit.

2. Proposita intētione versus warrantum.

Proposita igitur intētione petētis versus warranti,[2] statim respōdeat warrātus intētionē,[3] et defendat jus petentis, p̈ duellū vel per magnā assisam si voluerit, nisi exceptiones habeat cōpetētes, quas versus petētem p̈ponat, vel nisi forte warrātū habeat vel defensorem qui ipsū versus petentē defendere debeat, unū vel plures, q̃m incontinēti vocet per auxiliū curiæ, vel sine, sicut superius paulatim dictū est. Et eodē modo p̈cedatur (ut p̃dictū est) de warrāto in warrantū usq̃ ad plures successivè, donec nō sit aliquis ulterius qui vocari possit ad warrantū, et unde cùm plures vocati

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[1] "petentibus," this is evidently an error for "tam petente quam "tenente."

[2] "warrantum," MS. Rawl. C. 160.

[3] "intentioni," MS. id.

Chapter VII.

f. 387 b.

1. After essoins and delays the claimant and the warrantor being present in judgment, if the warrantor has gratuitously warranted and taken upon himself the defences, then let the tenant remain at home until the discussion has been had between the claimant and the warrantor.

After the essoins and distraints and legitimate delays there being present in judgment as well the claimant as the tenant and the warrantor, either he warrants forthwith, or he contends respecting the warranty that he ought not to warrant. But if without any contention he has gratuitously warranted and taken upon himself defences in the principal plea, the principal plea shall begin to be between the claimant and the warrantor himself, and thereupon let the tenant, to whom the warranty has been given, remain at home, until it has been ascertained which of them, the claimant or the warrantor, can prevail in the plea, and let the claimant propound his declaration against the warrantor as he at first propounded it against the tenant, because henceforth all things should proceed under the person of the warrantor as they would have to proceed under the person of the tenant, nor can the tenant henceforth lose, because if the warrantor cannot maintain him in his seysine, the tenant will have of the land of the warrantor, if he has any, compensation up to the value of the land which the tenant shall have lost.

2. The declaration having been propounded against the warrantor.

The declaration therefore of the claimant having been propounded against the warrantor, let the warrantor make answer to the declaration, and let him contest the right of the claimant by a duel or by a great assise if he wishes, unless he has competent exceptions to raise, which he can propound against the claimant, or unless by chance he has a warrantor or a defender who ought to defend him against the claimant, one or several, who should immediately vouch with or without the help of the court, as has been said a little above. And in the same manner let proceedings be had (as said above) from warrantor to warrantor up to several successively, until there be no one further who can be vouched to warrant,

fuerint de warrāto in warrātū, et ultimus warrantus p defaltam vel p juditiū amiserit, ipse tenebitur escābiū facere, et illud idē escābiū quasi de manu in manū, et warranto in warrantū usq̃ ad tenentē, cui primò fuit warrantizatū, et fiat talis irrotulatio. A. petiit versus B. tantam t̃ram in tali villa cum ptinētiis ut jus suū, vel talis mulier ut dotē suam, et hujusmodi. Et idē B. venit in eadē curia et vocavit ad warrantū C. qui venit et ei warrātizavit et in eadē curia corā eisdē justic. vocavit inde ad warrantū D. quī postmodū p juditiū vel p defaltam t̃ram illam amisit versus p̃dictū A., et ideo cōsideratū est q̄ p̃dictus A. recuperet seysinam suam versus p̃dictū B. de p̃dicta t̃ra cum ptinētiis et q̄ B. habeat de t̃ra D. escambium ad valentiam, sed p manū ipsius E. et ita fieri potest de pluribus warrantis in infinitū, et erit tale bř̃e de seysina facienda.

3. Breve de facienda seysina et sic de manu in manum de pluribus sicut de f. 388. uno, s. quod fiat escambium.

Rex vic. salutē. Scias q̄ cùm A. in curia nr̃a &c. peteret versus B. tantū t̃ræ &c. ut jus suū, idē B. venit in eadē curia nr̃a coram justic. nr̃is, et vocavit inde ad warrantū C. & qui venit in eadē curia et t̃ram illam eidē B. warrantizavit, et vocavit inde ad warrantū D. qui postea in eadē curia ei warrantizavit, & postea terram illam p defaltam vel p juditium amisit, ut p̃dictū est. Et ideo tibi p̃cipimus q̄ eidē A. de p̃dicta terra cum pertinentiis sine dilatione plenariam seysinam habere facias, & de terra ipsius D. in balliva tua eidē C. escambiū habere facias ad valentiam p̃dictæ terræ sine dilatione, et illud idem escambium p manus ipsius C. sine dilatione habere facias p̃dicto B. Teste &c. vel si plures sint ibi war-

and whereupon, when several have been vouched from warrantor to warrantor, and the last warrantor has lost by default or by a judgment, he shall be bound to make compensation, and to pass that compensation as it were from hand to hand and from warrantor to warrantor down to the tenant, to whom the warranty was first given, and let an enrolment be made in this manner: A. claims against B. so much land in such a vill with its appurtenances as his right, or such a woman as her dower, and such like. and the said B. appeared in the said court and vouched C. to warrant, who came and warranted to him and in the said court before the said justiciaries vouched thereupon D. to warrant, who afterwards by a judgment or by default lost that land against the aforesaid A., and thereupon it was resolved that the aforesaid A. should recover his seysine against the aforesaid B. of the aforesaid land with its appurtenances, and that B. should have of the land of D. compensation up to the value, but by the hand of the said E.: and so it may be done with several warrantors to infinity, and the writ for giving seysine shall be of this kind.

3. A writ to give seysine, and so from hand to hand from several as from one, to wit, that compensation may be made. f. 388.

The king to the viscount greeting. Know that, when A. in our court, &c. has claimed against B. so much land, &c. as his right, the said B. came into our said court before our justiciaries and vouched C. to warrant thereon, who came into the said court and warranted that land to the said B., and vouched thereon D. to warrant, who afterwards in our said court warranted the land to him, and afterwards he lost that land through default or through a judgment as above said. And accordingly we enjoin you that you cause the said A. to have plenary seysine without delay of the said land with its appurtenances, and you cause the said C. to have compensation from the land of the said D. in your bailiwick, and you cause the aforesaid B. to have that same compensation through the hands of the said C. without delay. Witness, &c. Or if there be more warrantors than two there

ranti vocati qm duo, ut si dicitur, A. petit versus B. tantam terram &c. et idē B. venit & vocavit inde ad warrantum C. & qui ei warrantizat & qui inde vocat ad warrantum D. & qui ei warrantizat & vocat ad warrantū E. et qui ipsi warrantizat, & cùm ipsū D. feoffatū suum et tenentē suum defendere non possit & per juditiū amiserit vel per defaltam, idem A. recuperet versus p̃dictum B. et D. faciet escambium de terra sua eidem B. ad valentiam, & illud idem escambium fiet prædicto A. quasi per manum ipsius D. nulla facta mentione de ipso C. nisi tantum de ultimo warranto, scilicet de E. & de D. suo tenente, cùm idem C. de suo nihil attribuit, & ideo dicatur sic in brevi de seysina facienda, de terra ipsius E. in balliva tua eidem B. escambium ad valentiam p̃dictæ terræ sine dilatione habere facias, & illud idē escambiū sine dilatione habere facias eidē B. Et eodem modo fiat si plures vocentur successive, usq̃ ad x. vel amplius in infinitū. Sed quid erit si E. ultimus warrantus, qui in se defensionē suscepit et amisit, nihil habeat unde facere possit escambiū, & D. habet ad sufficientiam qui warrantizavit C. & omnes alii usque ad B. qui warrantum vocavit, & iniquum esset q̃ B. esset sine escambio? æquum esset (ut videtur) q̃ de terra ipsius D. fieret escambium ipsi B. & quòd D. expectaret tempora meliora versus ipsum E. & tunc dici posset in brevi de seysina.

4. Si warrantus nihil habeat, unde facere possit escambium,

Et quia idem E. nihil habet unde escambiū facere possit ipsi D. ideo de terris ipsius D. in balliva tua eidē C. escambium ad valentiam prædictæ terræ, sine dilatione habere facias, donec idem E. aliquid habeat

vouched, as if it be said, A. claims against B. so much land &c., and the said B. came and vouched to warrant thereon C., who warranted it to him, and thereupon vouched D. to warrant, and who warranted it to him and thereupon vouched E. to warrant, and who warranted it to him, and who since he could not defend D., his feoffee and tenant, and lost it through a judgment or through a default, let the said A. recover against the said B. and D. shall make compensation from his land to the said B. up to the value, and the said same compensation shall be made to the aforesaid A. as if through the hand of the said D., no mention having been made of the said C. except only of the last warrantor, to wit, of E. and of D. his tenant, since the said C. contributes nothing of his own, and accordingly let it be stated thus in the writ for giving seysine, cause to be made of the land of the said E. in your bailiwick compensation to the said B. without delay up to the value of the aforesaid land, and cause that same compensation to be made to B. without delay. And in the same manner let it be done, if several are vouched successively up to ten or more to an infinite number. But what shall happen if E. the last warrantor, who has taken upon himself the defence and has lost, should have nothing wherewith he can make compensation. And D. who has warranted C. has a sufficiency and all the others up to B. who vouched a warrantor, and it would be inequitable that B. should have no compensation. It would be equitable (as it seems) that of the land of the said D. compensation should be made to the said B., and that D. should expect better times against the said E., and then it may be stated in the writ of seysine:

4. If the warrantor has nothing wherewith he can make compensation.

And because the said E. has nothing wherewith he can make compensation to the said D., therefore cause without delay compensation to be made to the said C. from the lands of the said D. in your bailiwick up to the value of the aforesaid land, until the said E. has something from

unde escambium facere potest, & illud idē escambium sine dilatione habere facias prædicto B. et sic fieri debet de pluribus warrantis de warranto in warrantū ab ultimo usq̃ ad primum, & idē fiat si ultimus warrantus escambium facere nō possit ad plenum, quòd id q̃ defuerit suppleatur de terris aliorum qui medii sunt de warranto in warrantum, ordine tamen observato ab ultimo usque primū.

5. Cum unus vel plures ex pluribus feoffatus fuerit, et ex pluribus tenentibus qui diversis temporibus feoffati fuerint, quod melior erit conditio ejus quoad escambium, qui primo feoffatus fuit, si uno tempore fuerint implacitati, aliud si diversis.

Cùm autē unus à pluribus qui diversis tēporibus feoffati fuerint vocatus fuit ad warrantū, & cùm defendere nō posset amisit, & omnibus teneatur ad escambiū. si omnibus satisfacere non possit, semper melior erit conditio ipsius qui primò fuit feoffatus, ut ipse escambium suum p̃deducat in parte vel in toto, & alii expectent tempora meliora, et sic omnes secundū prioritatē feoffamēti habebunt privilegium escābii, & hoc dico, si omnes simul et semel ipsū vocaverint ad warrantū, & de omnibus redditū sit juditiū uno et eodē die de warrantia, et omnes simul cùm implicitati fuerit unū warrantū vocaverint. Et de hac materia inveniri poterit in ultimo itinere M. de P. in coñ Suff. de Matilda q̃ fuit uxor Mathiæ de Thurfenne[1] in placito dotis, secus tamē est (ut videtur) si diversis tēporibus fuerint implacitati et diversis tēporibus warrantus vocatus qui amiserit.

6. Cum warrantus nihil habeat, unde escambium faciat, de hæreditate

Sed quid si warrantus cûm warrantizaverit & amiserit nihil habeat unde escābium facere possit, nec alienaverit rē obligatā ad warrantiam tacitè vel expressè, nec dolo fecerit quo minus habuerit, vel nihil, non erit p̃pter hoc absolvendus omnino de escābio

[1] " Mathiæ de Thurstone," MS. Rawl. C. 160.

which compensation can be made, and cause the said B. to have that same compensation without delay, and so it ought to be done with several warrantors from warrantor to warrantor, from the last up to the first, and so let it be done, if the last warrantor cannot make full compensation, that the deficiency may be supplied from the lands of the others, who are intermediate, from warrantor to warrantor, order however having been observed from the last up to the first.

5. When one or more of several have been enfeoffed, and of several tenants who have been enfeoffed at different times, that the condition of him, who was first enfeoffed, will be better as regards compensation, if they should be impleaded at one time, otherwise if at different times.

But when one out of several who have been enfeoffed at different times has been vouched as a warrantor, and has lost, when he could not defend, and he is bound to all to make compensation, if he cannot satisfy all, the condition of him who was first enfeoffed will always be better, that he should deduct in priority his compensation in part or in whole, and the others should expect better times, and so all according to priority of feoffment should have the privilege of compensation; and this I say, if all have together and at one time vouched the said person to warrant, and judgment has been rendered to all concerning the warranty on one and the same day, and all when they have been impleaded have at the same time vouched one warrantor. And on this matter a case will be found in the last iter of Martin de Pateshull in the county of Suffolk, concerning Matilda, who was the wife of Mathias de Thurfenne, in a plea of dower: it is otherwise however (as it seems) if they have been impleaded at different times, and the warrantor who has lost has been vouched at different times.

6. When a warrantor has nothing from which he can make compensation from

But what if the warrantor, when he has warranted and lost, has nothing wherewith he can make compensation, and he has not alienated the estate charged with a warranty tacitly or expressly, nor has practised by deceit how not to have it, or nothing, he ought not on that account to be absolved altogether from making

ejus cujus nomine vocatus fuerit ad warran tum.

faciendo, imo q̄ faciat escābium si quid ad eum pervenerit postea[1] de hæreditate patris vel matris vel alterius antecessoris, ratione cujus vocatus fuerit ad warrantū, ut de terr̃ S. M. anno regis H. xiii. incipiente xiv. in coñ Hertf., de B. quæ fuit uxor R. Russel.[2]

7. Si ille, qui feoffavit, tempore feoffationis satis habuit, res illa quam tunc habuit tacite obligatur vel expresse facta per modum donationis.

Itē q̄ illi qui primo feoffati fuerunt p̃rogativam habent, ꝑpter prioritate feoffamēti, cum ille qui feoffavit tēpore feoffamenti satis habuit, unde posset escābium facere. Et q̄ licet illud postmodū alienaret, rē quasi tacitè obligatā relinquit, ad quencunq̄ postmodū pervenerit: inveniri poterit in rotulo de terr̃ S. M. añ regis H. ix. incipiēte x. in coñ Kanc. de Rosia quæ fuit uxor Roberti de Goldingford, ubi quædam mulier petiit dotem versus quendā & uxorē suam, & ipsi vocaverint ad warrantū quendā qui fuit infra ætatem, & quæ respondit q̄ nihil habuit de hæreditate patris ratione cujus vocata fuit ad warrantū, de quo posset warrantizare & escābium facere, responsum fuit ex adverso q̄ tempore quo ipsi feoffati fuerūt, habuit eorum feoffator, scilicet vir mulieris petentis, quandam terram in manu sua quæ plenè sufficere posset ad warrantiam & escambium, et postea illam dedit cuidam qui præsens fuit & hoc cognovit, & unde consideratum fuit quòd mulier petens recuperaret de terra ipsius, qui ultimò feoffatus fuit, escambium suum, & q̄ post[3] feoffati tenerent in pace.

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[1] "postmodum pervenerit," MS. Rawl. C. 160.

[2] "Russell," MS. id.

[3] "post," omitted MS. Rawl. C. 160.

compensation, on the contrary he shall make compensation if any estate shall have come to him from the inheritance of his father or of his mother or of any other ancestor in regard of whom he has been vouched to warrant, as in Michaelmas term in the thirteenth and fourteenth years of the reign of king Henry in the county of Hertford, concerning B. who was the wife of R. Russel.

the inheritance of him in whose name he has been vouched to warrant.

7. If he, who has enfeoffed, had at the time of the enfeoffment, sufficient, the estate, which he then had, is tacitly charged, or expressly made through the mode of donation.

Likewise that those who have been first enfeoffed have a prerogative claim on account of the priority of their enfeoffment, when he who enfeoffed had at the time of the enfeoffment sufficient, wherefrom he might make compensation. And that although he has subsequently alienated it, he leaves the estate as it were tacitly charged, to whomsoever it may subsequently have come; a case may be found in the roll of Michaelmas term in the ninth and tenth years of king Henry in the county of Kent, concerning Rosia who was the wife of Robert de Goldingford, where a certain woman claimed dower against a certain man and his wife, and they vouched as a warrantor a certain person who was under age, and who answered that she had nothing from the inheritance of her father by reason whereof she had been called to warrant, with which she could warrant and make compensation, it was answered on the opposite side at what time the said persons were enfeoffed, their feoffor, to wit, the husband of the woman claiming, had a certain land in his hand, which would fully suffice to warrant and to compensate, and afterwards he gave it to a certain person who was present and acknowledged it, and thereupon it was resolved that the woman claiming could recover her own compensation from the land of him who was last enfeoffed, and that those subsequently enfeoffed should keep their land in peace.

Cap. VIII.

1. Si warrantus dicat quod warrantizare non debeat, quo casu oportet quod qui eum vocavit rationem ostendat, quare warrantizare debeat, si warrantus contendere velit.

Dictum est supra quid juris, cùm warrātus gratis warrātizaverit. Nūc autem dicendū, si de warrantia cōtendat, & dicat q̄ warrantizare nō debeat, & quo casu oportet eum qui warrantū vocavit rationē ostendere quare vocatus warrantizare debeat, cùm à vocato fuerit sup hoc requisitus. Et unde videndū qualiter warrātus teneatur ad warrantizandū, & quibus modis, & quando nō. Et sciendū q̄ ad omnes chartas de simplici donatione cōpetit tenenti warrantizatio, et tenentur donatores & eorum hæredes ad warrantiā, si hora cōgrua, & modo debito, cum p̄secutione cōpetenti, vocati fuerint ad warrantū, nisi forte in charta de feoffamēto cōtrariū exprimatur, scilicet q̄ donator ad warrantiam nō teneatur nec ad escambium, si vero charta fuerit de confirmatione, nō sequitur inde warrantizatio, nisi in se cōtineat donationē. Ut si dicatur, do & confirmo tali & hæredibus suis vel cuicunq̄ dare, assignare, vēdere, vel legare voluerit, tantā terrā &c. et sive procedat charta sive non de donatione, talis charta sufficit ad warrantiam.

2. f. 389. Confirmatio hæredis, cum jus ei descendit, facit primam chartam convalescere, quæ ab

Sufficit etiam charta de confirmatione quandoq̄ per se, quandoq̄ cum charta p̄cedente ubi ab initio invalida fuit donatio, eo q̄ donatorius seysinā rei donatæ non habuit in vita donatoris, quia ex charta de confirmatione subsequente facta ab hærede cùm ei jus descenderit, cōvalescit prima charta de donatione q̄ ab initio fuit invalida, et sic quælibet illarū juvat aliam. Item valet charta quoad warrantiam, si specialiter faciat

Chapter VIII.

1. If the warrantor says that he ought not to warrant, in which case it is incumbent for him who has vouched him to show reason why he ought to warrant, if the warrantor wishes to dispute.

It has been stated above what the right is when the warrantor has gratuitously warranted. Now we must treat the case if the warrantor disputes about the warranty, and says that he ought not to warrant, and in which case it is incumbent that he who has vouched a warrantor should show reason why the vouchee ought to warrant, when he has been required so to do by the voucher. And hence we must see in what manner the warrantor is bound to warrant and by what means, and when not. And it is to be known that upon all charters of simple donation the tenant is entitled to a warranty, and the donors and their heirs are bound to a warranty, if they have been vouched to warrant at a suitable hour and in due manner with a suitable request, unless by chance the contrary is expressed in the charter of feoffment, to wit, that the donor is not bound to warrant nor to make compensation, but if it be a charter of confirmation a warranty does not follow thereupon, unless it contains in itself a donation. As if it be said, I give and confirm to so-and so and his heirs, or to whomsoever he may wish to give, or assign, or sell, or bequeath, so much land, &c. and whether or not the charter proceeds to a donation, such a charter suffices for a warranty.

2. f. 389. The confirmation by an heir, when the right has descended to him, causes the first charter to become valid, which was

For a charter of confirmation suffices sometimes by itself, sometimes coupled with a preceding charter, where the donation was from the beginning invalid, inasmuch as the donatory had not seysine of the thing given in the lifetime of the donor, because from the subsequent charter of confirmation made by the heir when the right has descended, the first charter of donation, which was from the commencement invalid, becomes valid, and so each of them assists the other. Likewise the charter is valid as regards a warranty, if

initio fuit invalida.

mentionē de warrantia, ut si dicatur: Et ego et hæredes mei warrantizabimus &c. Itē valet etsi nō exprimatur, dum tamē homagiū et servitiū intervenerit, sive servitiū factū fuit donatori ꝑ manū donatorii, sive capitali dño donatoris pro donatore ꝑ manū donatorii.

3. Finis factus.

Itē sufficit finis factus in curia dñi regis, licet expressa warrantia, vel homagium et servitium nō intervenerit, dum tamen cōstiterit ꝑ finē et cyrographum, q̄ ille, qui tenet, tenere debeat de eo qui vocatur ad warrantum.

4. Homagium.

Est etiam casus specialis, ubi quis tenetur ad warrantiam et excambiū, quāvis alius in seysina fuerit de homagio et servitio tenentis sui, sicut capitalis dominus donatoris, ubi vz. tenens cum domino suo homagium suum obtulerit et servitiū, et dominus suus ea recusaverit sine justa causa, poterit tenēs impune ad capitalē dñum donatoris ire, et facere ei homagiū et servitium ꝑ defectu dñi sui, et idem dominus suus nihilominùs tenebitur ei ad warrantiam.

5. Homagium factum capitali domino de concessione medii.

Itē tenetur dominus ad warrantiam, ratione homagii ꝑ se, licet nullum servitiū de tenente suo receperit: ut cûm quis districtus fuerit ꝑ servitio q̄ dño capitali debetur, ꝑ defectu dñi sui qui medius est, et totum servitium percipit, et ꝑpriæ bursę infundit, et idem tenentem suum erga suum feoffatorem non acquietat, ꝑ defectu domini sui cum ꝑtestatione ꝑborum hominum poterit domino capitali de servitio suo acapitare et se attornare[1] ꝑ defectu ipsius dñi sui, & dominus suus nihilominus tenebitur ad warrantiam.

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[1] "et se attornare," omitted MS. Rawl. C. 160.

it specially makes mention of a warranty, as if it be said: And I and my heirs will warrant, &c. Likewise it is valid even if it be not expressed, provided homage and service have intervened, or if service has been made to the donor by the hand of the donatory, or to the chief lord of the donor instead of the donor by the hand of the donatory. from the beginning invalid.

Likewise a fine made in the court of the lord the king, although an express warranty or homage and service has not intervened, provided however that it has been established by a fine and a chirograph, that he, who holds, ought to hold from him who is vouched to warrant. 3. A fine made.

There is also a special case, where one is bound to a warranty and to make compensation, although another person has been in seysine of the homage and service of his tenant, as the chief lord of the donor, where, to wit, the tenant has offered to his lord his homage and service, and his lord has refused them without just cause, the tenant will be able with impunity to go to the chief lord of the donor, and to do him homage and service on account of the default of his own lord, and his said lord will nevertheless be bound to him for a warranty. 4. Homage.

Likewise a lord is bound to warrant by reason of homage to himself, although he has received no service from his tenant; as when a person has been distrained for a service, which is due to a chief lord, on account of the default of his lord who is intermediate, and who receives the whole service and pours it into his own purse, and does not discharge his tenant towards his feoffor, on account of the default of his lord, having called honest men to witness, he may pay a relief to the chief lord for his service, and may attourn himself to him on account of the default of his own lord, and his own lord shall notwithstanding be bound to a warranty. 5. Homage made to a chief lord by the concession of the intermediate one.

Cap. IX.

1. Cum warrantus warrantizaverit, suspenditur prosecutio contra tenentem, donec placitum de warrantia terminetur.

f. 389 b.

Post essonia & dilationes, de quibus satis dictum est supra, comparentibus in juditio tam petente qm tenente, qm warranto, & vicecom̃ miserit breve de summonitione warranti, suspenditur placitum principale, donec placitum de warrantia terminetur, & audito brevi excipere poterit warrantus contra breve de warrantia, si forte ibi fuerit error in nominibus personarum, vel villarum, ad breve de warrantia prosternendū, et secundū q aliàs pleniùs dicitur de erroribus.

2. Non tenebitur warrantus ad majus excambium, quam ad id ad quod vocatus est ad warrantum.

Visum autem petere non potest, quia satis sufficit p visu id quod dicitur, ad warrantizandū tantam terrā qm talis petit, sed statim inquirat warrantus à tenente, an aliquid habeat ppter quod teneatur ad warrātiam, chartam, vel aliud: & si chartas, vel instrumētum habeat, illud statim ostendat, instructus enim venire debet ad pbandā intētionem suā, nō est enim ei tempus indulgendū nisi ex causa, ut si instrumēta ita deposita sint q copiam inde habere non possit, nisi ad tēpus, & quo casu dabitur ei dilatio legitima ad exhibendū & pferendum instrumēta. Si autem dicat q instrumenta habuit, sed tamen casu deperdita sunt vel aliud simile, nihil aliud video, nisi quòd pbet casum. Cùm autē tenens instrumenta exhibuerit, & ostendat rationem quare vocatus ad warrātum warrantizare debeat, (secundum quod superius dictum est in pte,) respōdeat vocatus, et doceat quare warrantizare non debeat.

3. Si rex vocetur ad

Inprimis si ipse rex vocetur ad warrantum, secundū suum modum, et de puro feoffamēto antecessorū suorū,

Chapter IX.

After essoins and delays, concerning which we have said enough above, upon the claimant as well as the tenant appearing in judgment, as well as the warrantor, after the viscount has sent a writ for summoning the warrantor, the principal plea is suspended, until the plea concerning the warranty is terminated, and upon the writ having been read in court the warrantor may except against the writ concerning the warranty, if by chance there has been there an error in the names of the persons or of the vills, in order to overthrow the writ concerning the warranty, and according to what is said elsewhere more fully concerning errors.

1. When a warrantor has warranted, the suit against the tenant is suspended, until the plea concerning the warranty is terminated. f. 389 b.

But he cannot claim a view, because it suffices for a view what is said "to warrant so much land which so-" and-so claims," but let the warrantor forthwith inquire from the tenant, whether he has anything to show wherefore he should warrant, a charter or anything else: and if he has a charter or instrument, let him show it at once, for he ought to come prepared to prove his declaration, for he is not to be indulged with time except for cause shown, if the instruments are so deposited that he cannot have the use of them except at a certain time, and in which case there shall be allowed to him a legitimate delay to exhibit and to produce the instruments. But if he should say that he has had instruments, but by accident they have been lost or something similar, I see no other course but that he should prove the accident. But when the tenant has exhibited the instruments, and shown reason wherefore the person vouched to warrant ought to warrant (according to what has been partly stated above) let the vouchee answer and show why he should not warrant.

2. The warrantor shall not be bound to greater compensation than to that to which he has been vouched to warrant.

In the first place, if the king himself should be vouched to warrant according to his own manner and concerning

3. If the king is vouched

warrantum de dono antecessoris, quis sit antecessor regis videndum. Britton, l. iii. c. xi. § 22 ; c. xxii. § 7.

videndum erit qui sunt antecessores sui. Non enim tenetur warrantizare donationē & feoffamenta regum qui regnaverunt ante cōquestū, ipse enim rex nō est eorum hæres, et perinde ad warrantiā non tenetur, nisi de facto suo, si se ad warrantiam obligaverit per confirmationē. Si autē de puro feoffamento suo, vel antecessorum suorum, warrantizare tenetur, nisi conditio vel modus aliud inducat, sed semper erit sua voluntas expectanda, cùm non possit eī necessitas imponi. Si autē de puro feoffamento antecessorum suorum, et de sua pura confirmatione, tunc warrantizare tenetur. Si autē pura sit donatio, & cōfirmatio cōditionalis, vel modalis, ut si dicatur, secundū q̄ charta talis regis antecessoris nostri rationabilis testatur, tunc præjudiciale erit istud. Ideo illud imprimis debet inquirere, utrum donatio prima rationabiliter facta sit vel non, et secundum hoc terminare negotium : & cùm quis dñm regem ita warrantum nominaverit, solet hoc aliquando cum p̄testatione fieri, q̄ si hoc non sufficeret, tenens diceret aliud, quòd quidem modo recessit ab aula, quia vocatio illa aliquādo frivola inventa fuit et quasi nulla.

4. Si privata persona vocetur ad warrantum ratione chartæ suæ, vel antecessorum suorum.

Si autem privata persona vocetur ad warrantum ratione chartæ suæ vel antecessorū suorum, contra chartas poterit multipliciter responderi. Inprimis q̄ charta viciosa est in se, vel p̄pter rasuram in loco suspecto habitam, vel p̄pter signum falsum quod appositum est, quorum unum p̄bari potest per aspectū, & aliud per collationem signorum. Item q̄ si charta sufficiens sit & bona, excipi poterit contra illam q̄ valere non debeat, quia confecta fuit dum donator

an absolute feoffment of his ancestors, it will have to be seen who are his ancestors. For he is not bound to warrant the donations and feoffments of the kings who reigned before the Conquest, for the king himself is not their heir, and accordingly is not bound to warrant except concerning his own act, if he has bound himself to warrant by a confirmation. But if he be vouched concerning an absolute feoffment of his own or of his ancestors, he is bound to warrant, unless a condition or a mode induces otherwise, but his pleasure will always have to be awaited, since necessity cannot be imposed upon him. But if concerning a pure feoffment of his ancestors and a pure confirmation of his own, then he is bound to warrant. But if the donation be pure and the confirmation conditional or modal, as if it be said, according to what a reasonable charter of such a king our ancestor testifies, then that will be prejudicial. Accordingly he ought in the first place to inquire whether the first donation has been reasonably made or not, and according to this to determine the business, and when one has thus named the king as a warrantor, this is sometimes accustomed to be done with a protestation, but if it should not suffice, the tenant would say another thing, that he has lately withdrawn from the Hall, because that vouching has sometimes been found to be frivolous and as it were null.

for the donation of his ancestor, it is to be seen who is the ancestor of the king.

4. If a private person be vouched to warrant by reason of his own charter or that of his ancestor.

But if a private person has been vouched to warrant by reason of his own charter or that of his ancestors, a multifarious reply may be made against the charters. In the first place that the charter is defective in itself, either on account of an erasure having been made in a suspicious place, or on account of a false signature which has been applied to it, whereof one may be proved by the aspect of it, and the other by a comparison of signatures. Likewise that if the charter be sufficient and genuine, it may be objected to it that it ought not to avail because it was made when the donor was not in

non fuit compos sui, nec bonæ memoriæ, q̃ quidem p̃bari potest per testes in charta nominatos, et per patriam, & qualiter hoc p̃bari debeat, dicetur infra plenius in titulo de warrantia chartæ.

Infra, ch. 15.

5. In quibus casibus non tenetur warrantizare.

Item excipere poterit warrantus contra tenentē qui vocávit, q̃ licet charta de feoffamēto sufficiēs sit in se, tamen donū illud est insufficiēs: quia donatorius qui chartā p̃fert, vel ejus antecessor, cui donū fieri debuit, nūqm seysinā habuerit de ĩra data in vita donatoris, nisi post mortem ejus per intrusionem, & p̃pter q̃ ille qui vocatus est ad warrantū, intendit petere illā in dominico de seysina antecessoris sui, qui inde obiit seysitus ut de feodo.

f. 390.

6. Exceptio quod donator nunquam fuit in seysina.

Itē excipere poterit, q̃ antecessor, qui donum fecisse debuit, nunqm in seysina fuit de tali terra, q̃ donationē facere potuit. Poterit quidem charta esse sufficiēs, quæ nō est nisi vestimentū donationis, et donū illud insufficiens p̃ defectu seysinæ, & e cōtra, donū sufficiens, & charta vitiosa: & aliquādo utrūq̃ vitiosū et insufficiēs, & sic utrumq̃ nullum. Et unde si charta de donatione p̃feratur, oportet q̃ warrantus utrumq̃ defendat, scilicet chartā et donū, et ex hoc habet tenēs necesse p̃bare utrūq̃ p̃pter copulativā cōjunctionē (&) interjectā: unde si in p̃batione unius defecerit, perinde haberi debet ac si in p̃batione utriusq̃ defecerit, nō enim sufficit probare chartā sufficientē, si donū sit insufficiens. Itē quicunq̃ donū cognoverit, warrantizare tenetur, quāvis ostendere possit chartā esse vitiosam vel falsā, quia donū valere possit, etiam si charta nō intervenerit, ut de itinere W. de Ralegh

possession of his faculties, or not of good memory, which may be proved by the witnesses named in the charter, and by the country; and in what manner this ought to be proved, will be said below more fully in the title concerning the warranty of a charter.

5. In what cases he is not bound to warrant.

Likewise the warrantor may except against the tenant who has vouched him, that although the charter of feoffment be sufficient in itself, nevertheless the gift is insufficient, because the donatory who produces the charter, or his ancestor, to whom the gift ought to have been made, never had seysine of the land given in the lifetime of the donor, except after his death by intrusion, f. 390. and by reason whereof he who has been vouched to warrant, intends to claim it as his domain from the seysine of his ancestor, who died seysed of it as of fee.

6. An exception that the donor was never in seysine.

Likewise he may except that the ancestor, who ought to have made the donation, never was in seysine of so much land, so that he could make a donation of it. The charter may indeed be sufficient, which is nothing more than the vesture of the donation, and the donation itself may be insufficient from default of seysine, and on the contrary, the donation may be sufficient and the charter faulty, and sometimes both of them faulty and insufficient, and so both of them null. And hence if a charter of donation be produced, it is incumbent that the warrantor defend both, to wit, the charter and the donation, and from this the tenant is under the necessity to prove both on account of the copulative conjunction ("and") being interposed, whence if he fail in the proof of one, it ought to be the same as if he had failed in the proof of both, for it is not sufficient to prove the charter sufficient, if the donation be insufficient. Likewise whoever has acknowledged the donation is bound to warrant, although he may show that the charter is faulty or false, because the donation may be valid, even if a charter has not intervened, as in the iter of William de

in com̃ Buck., de Alicia de Rupella. Itē etsi donatio ab initio invalida fuerit ꝑpter nō seysinā, poterit postmodū cōvalescere ex facto hæredis: ut si cùm donatorius quocūq̃ modo in seysina fuerit, cùm jus ad hæredē descēderet, recognoscat hæres chartā patris sui & donū, et homagiū donatorii ceperit, vel donū patris cōfirmaverit, terrā illā petere non poterit in dominico, sed illā warrātizare tenetur cōtra alios: ut de itinere M. de P. & sociorum suorū in diversis com̃ post guerram, de loquelis q̃ remanserunt ad judiciū, si Wilhelm̃ de Grēbale.

7. Quod non est hæres, nec suus feoffatus.

Excipere etiā poterit vocatus ad warrantū cōtra tenentē qui vocavit, q̣ ipse tenens nō est feoffatus suus, nec hæres ejus q̃m feoffavit, & cûm charta donationis mētionē nō faciat nisi tantū de suo feoffato, et ejus hęredib⁹: et unde si su⁹ feoffat⁹ vel ej⁹ hæres alios feoffaverit, ipse talib⁹ im̃ediate warrantizare nō tenetur, cū charta de talib⁹ nō faciat mētionē: ut de term̃ P. anno regis Henr̃ nono in com̃ Midd̃, de quadā Juliana q̃ petiit dotē versus quendā Henr̃, qui vocavit inde ad warrātū quendā W. filiū Herewardi, & qui respondit q̣ warrantizare nō debuit, quia nec ipse nec pater suus eundē Henricū feoffaverint, sed cognovit q̣ pater suus feoffavit q̃ndam Thomā, & ipse Thomas feoffavit ipsum Henricū, et desicut ipse Hēricus nō fuit hæres ipsius Thomæ (quāvis ab eo feoffatus) nec ipse Wilhelm̃ fuit in seysina de homagio & servitio ipsius Hērici, nec ipse Hēricus chartā habuit de ipso Wilhelm̃, nec aliud per q̣ ei warrantizare deberet, ideo

Ralegh in the county of Bucks, concerning Alicia de Rupella. Likewise although the donation may have been invalid from the beginning on account of a want of seysine, it may subsequently have been made valid by the act of the heir, as if when the donatory has been in seysine howsoever, when the right has descended to the heir, the heir has acknowledged the charter of his father and the gift, and has accepted homage from the donatory, or has confirmed the gift of his father, he cannot claim that land in domain, but he is bound to warrant it against others, as in the iter of Martin de Pateshull and his associates in the different counties after the war, concerning the causes which remained for judgment, if Wilhelmus de Grembale.

7. That he is not the heir, nor his feoffee.

The person vouched to warrant may also except against the tenant, who has vouched him, that the tenant is not his feoffee, nor the heir of him whom he has enfeoffed, and since the charter of donation does not make mention of any one but his feoffee and his heirs: and hence if his feoffee or his heir has enfeoffed others, he is not bound to warrant such persons immediately, since the charter does not make mention of them, as in Easter term in the ninth year of the reign of king Henry in the county of Middlesex, concerning a certain Juliana who claimed dower against a certain Henry, who vouched thereupon to warrant a certain William the son of Hereward, and who answered that he ought not to warrant, because neither he nor his father had enfeoffed the said Henry, but he acknowledged that his father had enfeoffed a certain Thomas, and the said Thomas had enfeoffed the said Henry, and since the said Henry was not the heir of the said Thomas, (although enfeoffed by him,) and the said William was not in seysine of the homage and service of the said Henry, and the said Henry had not a charter from the said William nor anything else, wherefore he ought to

cōsideratum fuit quòd Wilhelmus quietus esset de warrantia.

8. Non tenetur aliis hæredibus warrantizare quam illis, qui sunt in charta comprehensi secundum modum donationis.

Item ad warrantiam non tenetur quis aliis hæredibus quàm illis qui in charta comprehensi sunt per modum donationis, ut si cui facta fuerit donatio, scilicet sibi & hæredibus suis, quos de carne sua & uxore desponsata sibi procreatos haberet, vel de certa uxore tali.

9. Ubi quis remisit et quietum clamavit.

Item non tenetur quis ad warrantiam ratione alicujus quietè clamantiæ: ut si quis terram petat versus aliquem ut jus suum, et postea illam remiserit & quietum clamaverit, ex hoc autem vocare non poterit ad warrantum illum, à quo jus fuerit remissum: ut de itineř abbatis de Rading et M. de P. in coñ Gloc. anno regis H. quinto, de Radulpho Chandos.

f. 390 b.

10. Si salvo jure cujuslibet.

Itē non tenetur ad warrantiam quis ratione homagii q̄ ab aliquo ceperit salvo jure cujuslibet: ut si dubitetur an alius sit hæres, nec sit alius hæres apparēs, ut si dicatur: capio homagium vestrum salvo jure cujuslibet. Vel sic: Capio homagiū vestrū de jure vestro, cùm quasdam ῖras de pluribus ῖris teneat, de quibus alii jus habēt, & quas ipse warrantizare nō debeat. Si autē nullū sciat esse hæredē, vel dubitet an sit alius hæres, quia bastardus forte se gerat p̄ hærede, & se domino offert sicut hæres, vel si dominus petat versus tenentē sicut eschaetam suam, & per cōsequens nullū esse hæredē.

11. Si non tenuerit

Itē non tenetur hæres alicui, qui cognovit in curia, q̄ nō tenuit tenementū de quo vocat warrantū nisi ad

warrant him, therefore it was resolved that the said William should be acquitted of the warranty.

8. He is not bound to warrant to other heirs, than to those who are comprised in the charter according to the mode of the donation.

Likewise a person is not bound to a warranty to other heirs than to those who are comprised in the charter through the mode of the donation, as if the donation has been made to any one, to wit, to himself and to the heirs whom he may have begotten from his own flesh and his espoused wife, or from a certain wife.

9. Where a person has released and quit-claimed.

Likewise a person is not bound to a warranty by reason of any quit-claim: as if a person claims land against any one as his right, and subsequently has released it and quit-claimed, he cannot thereupon call him to warrant, by whom the right has been released, as in the iter of the abbot of Reading and Martin de Pateshulle in the county of Gloucester in the fifth year of king Henry, concerning Randolph Chandos. f. 390 b.

10. If saving the right of any one.

Likewise a person is not bound to a warranty by reason of homage, which he has accepted from any person, saving the right of such an one: as if it be doubted whether another person be the heir, and there is no other heir apparent, as if it should be said: I accept your homage, saving the right of such an one; or thus: I accept your homage of your right, when he holds certain lands of several lands, concerning which others have a right, and which he himself ought not to warrant. But if he does not know that there is any heir, and he should doubt whether another person be the heir, because a bastard perhaps holds himself out to be the heir, and presents himself to the lord, as if he were the heir, or if the lord claims against the tenant as it were his escheat, and consequently that there is no heir.

11. If he has not held

Likewise the heir is not bound to any one, who has acknowledged in court that he has not held the tenement,

nisi ad vitam, vel si certi homines excepti sunt.

vitã antecessoris ejus q̃m nunc vocat ad warrantũ. Itẽ nõ tenetur quis ad warrantiam p̱ modũ donationis contra certas p̱sonas in donatione exceptas, ut si dicatur: Ego & hẹredes mei warrantizabimus contra omnes gẽtes, p̃terquàm cõtra talẽ & talẽ: ut de itinere abbatis de Radinge & M. de P. in coñ Warr̃, assisa mortis antecessoris, si Wilhelmus Trussell.

12. Si modus in donatione contentus quod donator non teneatur ad warrantiam, et quod conventio vincit legem.

Itẽ nõ tenetur quis ad warrantiam, quamvis homagiũ intervenerit, p̱ modũ donationis ex cõsensu donatorii, ut si quis donationẽ fecerit aliqui p̱ homagio & servitio, & dicatur in charta p̱ se & hæredibus suis, q̱ si donatoriũ contingat implacitari q̱ nec ipse nec hæredes sui ad excambium teneantur nec ad warrantiã, sicut de Wilhelmo de Bruere in multis chartis suis, & sic vincit summa[1] conventio legem, sicut in multis aliis locis & casibus supradictis. Sed quid si, cùm donatorius implacitatus fuerit p̱pter homagiũ, (q̱ p̱bari poterit,) feoffatorem suum vocaverit ad warrantum, & cùm ipse feoffator excepit q̱ ad warrantiam nõ teneatur per modum donationis, donatorius noluerit chartam exhibere, cùm faciat cõtra ipsum: quæritur an ad hoc cõpelli possit? & si cõpellatur, respondeat q̱ chartam non habuerit: & si habuerit, q̱ illam casu amisit: sic videtur q̱ deficiat p̱batio, licet jus non deficiat, nisi sit qui dicat hoc p̱ patriam esse dirimẽdum. Consultẽ igitur faceret donator, si per scriptum aliq̱ de tali conventione in initio donationis sibi cautius p̱spiceret.

[1] "summa," omitted, MS. Rawl. C. 160.

for which he vouches a warrantor, except for the life of the predecessor of him, whom he now vouches to warrant. Likewise a person is not bound to a warranty by the mode of the donation against certain persons excepted in the donation, as if it should be said, I and my heirs will warrant against all people, except against so-and-so, as in the iter of the abbot of Reading and Martin de Pateshull in the county of Warwick, an assise of mortdancester, if Wilhelmus Trussell.

except for his life, or if certain persons are excepted.

12. If a mode be contained in the donation, that the donor is not bound to warrant, and that a convention overrides the law.

Likewise a person is not bound to warrant, although homage has intervened, through the mode of the donation with the consent of the donatory, as if a person has made a donation to any one for his homage and service, and it be said in the charter for him and his heirs, but if it should happen that the donatory should be sued, that neither he himself nor his heirs should be bound to make compensation nor to warranty, as in the case of Wilhelm de Bruere in many of his charters, and thus a convention over-rules the law, as in many other places and cases above said. But what if, when the donatory has been sued, he shall have vouched his feoffor to warrant on account of his homage (which can be proved), and when the feoffor himself has excepted that he is not bound to a warranty through the mode of donation, the donatory should be unwilling to exhibit his charter, since it makes against himself, it is asked if he can be compelled to do this? and if he should be compelled, he shall answer that he has not the charter, and if he has had it, that he has lost it by accident; it thus seems that the proof fails, although the right is not deficient, unless there be some one who says that this ought to be decided by the country. The donor would thus act prudently, if he should more cautiously provide for himself by some writing concerning such a convention at the commencement of the donation.

13. Propter variationem, si tenens semel cognoverit, quod non tenuit tenementum nisi ad vitam vel ad voluntatem domini, qui vocatur ad warrantum.

Itē nec ad excambiū tenetur nec ad warrantiam quis ꝑpter variationē, ut si quis semel cognoverit q̄ terram non tenuerit nisi ad voluntatem talis dñi sui, et si postea dicat q̄ in feodo, cadit ab intentione sua ꝑpter variationē: ut de termino Sancti Hilarii anno regni regis Henrici octavo. Et eodem modo nō admittitur variatio, ut si quis fuerit requisitus in placito de ꝑparte, an teneat pro hærede, & confiteatur quòd sic, et postea dicat q̄ inde feoffatus sit, & warrantum vocaverit, non audietur propter variationē, cùm ista variatio sit contra breve, & contra intentionem petentis, cui primò consensit: sed si primò cōfiteretur quòd teneret sicut feoffatus, & non hæres, & sic contra breve: & postea variaret, & confiteretur se esse hæredem, talis variatio admittenda esset, quia non in p̄judicium petentis, prima autem non, quia in præjudicium.

14. Non tenetur quis ad warrantiam nec excambium de feoffamento et incumbratione tenentis sui vel de injuria et injusta detentione. f. 391.

Item non tenetur quis ad warrantiam de injuria & injusta detentione tenentis sui versus feoffatum à suo tenente. Ut si A. feoffaverit B. de aliquo tenemento, & idem B. de eodem feoffaverit C. et C. relictis hæredibus infra ætatē existentibus decedat, & B. ratione custodiæ ceperit tenementum illud in manum suam, & cùm hæres ad ætatem pervenerit tulerit assisam super ipsum B., & B. inde ad warrantū vocaverit ipsum A., idem ad warrantiā non tenebitur de injuria et injusta detentione tenentis sui, quia ex hoc sequeretur q̄ si ipse hæres recuperaret tenementum suum, q̄ idem A. teneretur B. ad escambium, et de hac materia inveniri poterit in rotulo de term̄ S. Hilarii, anno regni regis Henrici decimoquarto, assisa mortis ante-

13. On account of a variation, if the tenant has once acknowledged, that he has only had the tenement for his life or at the will of the lord, who is vouched to warrant.

Likewise a person is not bound to make compensation nor to a warranty on account of a variation, as if a person has once acknowledged that he has not held that land except at the will of so-and-so his lord, and if he should afterwards say that he holds it in fee, he is cast from his declaration on account of the variation, as in St. Hilary term in the eighth year of the king. And in the same way a variation is not admitted, as if any one has been required to answer in a suit for an apportionment, whether he holds as the heir, and he confesses that he does so, and afterwards should say that he has been enfeoffed therewith and should have vouched a warrantor, he shall not be heard on account of the variation, since that variation is against the writ and against the declaration of the claimant, to which in the first place he assented; but should he at first confess that he held as a feoffee and not as an heir and so against the writ, and afterwards should vary and admit himself to be the heir, such a variation would have to be allowed, for it is not to the prejudice of the claimant, but not the first variation, because it is to his prejudice.

14. A person is not bound to a warranty, nor to make compensation for the feoffment and encumbrance of his tenant or for his wrong-doing and unjust detention.

f. 391.

Likewise a person is not bound to a warranty for the wrong-doing and unjust detention of his tenant against a feoffee of his tenant. As if A. has enfeoffed B. with a certain tenement, and the said B. has enfeoffed C. with it, and C. dies having left heirs under age, and B. on the ground of wardship has taken the tenement into his own hand, and when the heir has come of age he has brought an assise against B., and B. has thereupon vouched the said A. as a warrantor, the said A. is not bound to a warranty for the wrong-doing and unjust detention on the part of his tenant, because it would follow therefrom that, if the said heir should recover his tenement, the said A. would be bound to B. to provide him compensation, and on this matter a case will be found in the roll of St. Hilary's term in the fourteenth year of the reign of king Henry, an assise of mortdancester if Godfrey the

cessoris, si Galfridus pater Gilberti, & quam ĩram prior de Colum tenuit, et qui vocavit inde ad war-
cf. f. 87 b. rantū q̃ndam Warinum de Monte Caviso[1] versus p̃dictum Gilbertum, et ubi idem Warinus venit et cognovit q̨ domus illius prioris de Colum feoffata fuit per antecessores suos de tenemento unde assisa arramata fuit, sed p̃decessores ipsius prioris feoffaverunt p̃dictum Galfridum, de cujus morte assisa arramata fuit, et unde ibi consideratū fuit q̨ Warinus non tenebatur ad warrantiã ꝑpter incumbramentum p̃decessoris ipsius prioris. Et sic videtur q̨ sive feoffatus medius fuit detentor injustus sive alios inde feoffaverit et sic tenementū incũbraverit, sive ipse implacitatus fuerit per assisam, sive vocatus ad warrantum à tenente suo et facto ꝑprio, q̨ feoffator suus non tenebitur ad warrantiam, licet teneatur contra extraneas ꝑsonas de warranto in warrantum usq̃ ad plures, contra extraneas ꝑsonas quæ jus habuerint in re data ante feoffamentum suum, quod primum fuit et principale, & in quo casu tenet warrantizatio ab ultimo feoffato usq̃ ad primū feoffatorem, et quilibet tenetur suo feoffato warrantizare per ordinẽ, cùm feoffati fuerint sibi et hæredibus suis. Si autem sic, sibi et hæredibus suis, vel cui dare vel assignare voluerit, tunc habebit assignatus vel donatorius electionem, utrum velit vocare ad warrantum suum feoffatorem, vel feoffatorẽ sui feoffatoris ꝑpter modū primæ donationis ĩmediatè, et sic cõsiderare oportet utrū quis feoffatus fuerit sic vel sic. Item esto quòd A. primò feoffaverit B. et B. relicto hærede infra ætatem moriatur, et cùm A. in manum suam ceperit hæreditatem ratione custodiæ, feoffaverit C. qui inde seysitus moriatur relicto hærede

[1] "Monte Caniso," MS. Rawl. C. 160.

father of Gilbert, and which land the prior of Colum held, and who vouched to warrant thereon a certain Warinus de Monte Caviso against the aforesaid Gilbert, and where the same Warinus came and acknowledged that the house of the said prior of Colum had been enfeoffed by his ancestors from the tenement whereon the assise had been instituted, but the predecessors of the said prior had enfeoffed the aforesaid Godfrey, upon whose death the assise had been instituted, and whereupon it was there resolved that Warinus was not bound to warrant on account of the encumbrance of the predecessor of the said prior. And so it seems that, whether the intermediate feoffee has been the unjust holder (of the tenement) or has therewith enfeoffed others and encumbered the tenement, whether he has been impleaded through means of an assise or has been vouched to warrant by his tenant and by his own act, that his feoffor will not be bound to a warranty, although he be bound against outside persons from warrantor to warrantor as far as several, against outside persons who had right in the thing given before his enfeoffment, which was the first and the principal, and in which case the warranty binds from the last feoffee to the first feoffor, and each person is bound to warrant to his feoffee in order, when they have been enfeoffed for themselves and their heirs. But if thus, to themselves and their heirs or to whomsoever they may choose to give or to assign it, then the assignee or donatory shall have his election whether he wishes to call his feoffor to warrant, or the feoffor of his feoffor, on account of the mode of the first donation immediately, and so it is incumbent to consider whether a person has been enfeoffed in this or in that manner. Likewise let it be that A. has in the first place enfeoffed B., and B., having left an heir, dies under age, and when A. has taken into his hand the inheritance by reason of guardianship, he has enfeoffed C. who dies seysed thereof leaving an heir

infra ætatem, et A. eodem modo ceperit terram in manum suam ratione custodiæ, et cùm uterq̃ hæredum assisam mortis antecessoris proferat super ipsum A., idem A. de incumbramento suo warrantum vocare non poterit, propter factum & proprium incumbramentum suum, sed assisa ultimi feoffati ꝑcedet primò super ipsum A., & cùm recuperaverit, tunc cadit assisa primi feoffati impetrata super ipsum A. et reincipiet super ultimum feoffatum, ut ipse ad warrantum vocet ipsum A.; & cùm hæres primi feoffati recuperaverit versus A., habeat hæres ultimi feoffati ad valentiam de terra warranti. Et q̃ dicitur de uno feoffato erit observandum in pluribus feoffatis, & eorum hæredibus in infinitum, ut si A. feoffaverit B., & B. C., & C. D., & D. E., & E. F., sic in infinitum. Si aliquis capitaliū dominorū usq̃ ad primū feoffatorē justè sicut ex causa donationis, vel nomine custodiæ, vel aliqua alia justa
f. 391 b. de causa: vel injustè, sicut per intrusionē vel disseysinā, sive tenemētum tenuerit in manu sua & inde implacitatus fuerit, sive alios feoffaverit à latere unum vel plures, & ipse alios unum vel plures, simul vel successive, et ipse talis vocetur ad warrantū, nunquam de facto et incumbramēto suo suum feoffatorem vocare poterit ad warrantum.

15. Non tenetur quis de incumbramento tenentis sui.

Item esto q̃ quis de ꝑprio facto et incumbramento feoffatorem suum vocaverit ad warrantum, et cùm ipse warrantizaverit, et excambium fecerit, qualiter et ꝑ q̃ breve debeat excambium revocari: verbi gratia, A. feoffat B., B. vero feoffat C. amitam D.; mortua C., D. ꝑfert assisam versus B. capitalem dominum qui feoffavit C., B. vocat inde ad warrantum A., A. venit et warrantizat, D. recuperat seysinā suam versus A.,

under age, and A. in the same manner has taken his land into his hand by reason of guardianship, and when each of the heirs brings an assise of mortdancester against the said A., the said A. cannot call a warrantor concerning his incumbrance, on account of his own act and his own incumbrance, but the assise of the latest feoffee shall proceed in the first place against A. himself, and when he has recovered, then the assise of the first feoffee sued out against the said A. falls and shall begin again against the latest feoffee, so that he should vouch the said A. to warrant, and when the heir of the first feoffee has recovered against A., let the heir of the latest feoffee have an equivalent from the land of the warrantor. And what is said of one feoffee will have to be observed in several feoffees and their heirs to infinity, as if A. has enfeoffed B., and B. C., and C. D., and D. E., and E F., and so on to infinity. If one of the chief lords up to the first feoffor justly as in a cause of donation or in the name of guardianship or for some other just cause; or unjustly, as by intrusion or by disseysine, f. 391 b. whether he has kept the tenement in his own hand and has been impleaded thereon, or has enfeoffed others collaterally, one or more, and he himself one or more, together or successively, and the said so-and-so himself should be vouched to warrant, he will never be able to call his feoffor to vouch to warrant concerning his act and encumbrance.

15. A person is not bound respecting the encumbrances of his tenant.

Likewise let it be that a person has vouched his feoffor to warrant concerning his own act and encumbrance, and when he has himself warranted and made compensation, in what manner and by what writ ought the compensation to be revoked? For instance, A. enfeoffs B., B. then enfeoffs C. the aunt of D.; upon the death of C. D. brings an assise against B. the chief lord who has enfeoffed C., B. then vouches A. to warrant thereon, A. comes and warrants. D. recovers his seysine against A., A. gives land in compensation to the said B. up to the

A. facit excambiū ipsi B. ad valentiam. Ad querelam igitur ipsius A. restituetur ei excambiū per breve q̄ tale erit.

16. De excambio rehabendo, si factum fuerit.

Rex vicecom̃ salutem. Præcipimus tibi q̄ venire facias coram nobis vel justiciariis nostris apud Westmonasterium ad terminū talē Benedict̃ ad respondendū Adæ quare excambium cepit de t̃ra ipsius A. ad valentiam tantæ t̃ræ cum pertinentiis in tali villa, quam D. in curia nostra coram justiciariis nostris talibus recuperavit versus eundē B. p̄ assisam mortis antecessoris inde captam inter p̃dictum D. et eundē B., & unde idem B. vocavit ad warrantum p̃dictum A. versus p̃dictum D., & qui venit et ei warrantizavit terram illam quam p̄ater suus dederat ipsi B., sed excambiū inde facere non debuit (ut dicit) eo q̄ C. amita prædicti D., de cujus morte prædictus D. tulit assisam illam, feoffata fuit de prædicta terra à p̃decessoribus prædicti B. postquam pater prædicti A. eandē terram dederat ipsi B. ut idē A. dicit. Et habeas ibi summonitorū nomina et hoc breve. Teste &c. Et unde cùm idem Benedictus convictus fuerit tale recepisse excambium, illud restituet quasi injuste receptum. Et q̄ ita sit, inveniri poterit de termino S. Hilarii anno regni regis Henrici decimoquinto in com̃ Berkshire de priore de Bradley et Wilhelmo de Cyfrewast.

Cap. X.

f. 392. 1. Suspenditur quandoque warrantia ad

Suspenditur quandoque warrantia ad tempus propter minorem ætatem, quandoq̃ p̄pter mortem warranti, & quandoq̃ p̄pter casum fortuitum supervenientē, & nō

value. Upon the complaint therefore of the said A. the compensation will be restored to him through a writ, which will be of this character.

16. Of recovering land, if it has been given in compensation.

The king to the viscount greeting. We enjoin you that you cause to come before us or our justiciaries at Westminster at such a term Benedictus to answer to Ada, wherefore he has taken compensation of the said A. up to the value of so much land with its appurtenances in such a vill, which D. in our court before so-and-so our justiciaries recovered against the said B. through an assise of mortdancester thereupon held between the aforesaid D. and the said B., and whereof the said B. vouched the aforesaid A. to warrant towards the aforesaid D., and who came and warranted to him that land which his father had given to the said B., but he ought not to have made on that account compensation (as he says), inasmuch as C. the aunt of the aforesaid D., concerning whose death the aforesaid D. brought that assise, was enfeoffed of the aforesaid land by the predecessors of the aforesaid B. after the father of the aforesaid A. had given that land to the said B. as the said A. says. And have there the names of the summoners and this writ. Witness &c. And whereupon when the said Benedictus had been proved to have received such compensation, he shall restore it as unjustly received by him. And that it is so may be seen in a case in St. Hilary term in the fifteenth year of the reign of king Henry in the county of Berkshire, concerning the prior of Bradley and Wilhelmus de Cyfrewast.

Chapter X.

f. 392.

1. A warranty is sometimes suspended

A warranty is sometimes suspended for a time on account of minority, and sometimes on account of death, and sometimes on account of a fortuitous accident supervening, and the principal action is

tempus propter minorem ætatem vel propter mortem.

perimitur sed durat actio principalis, cùm adhuc durat fundamentum, scilicet placitum principale super quod construi poterit ædificium, ut si durantibus partibus principalibus, petente vz. et tenente, moriatur warrantus. Si autem aliqua partium vel ambæ partes principales moriantur, sic cadit causa principalis et totum fundamentū, et per consequens placitum incidens de warrantia. Suspenditur autem warrantia ad tempus propter minorem ætatem ipsius warranti in placito proprietatis : ut si pater vel mater, vel alius antecessor, de aliquo tenemento obiit seysitus ut de feodo, quo casu, ille qui minor est, sive unus sive plures, ante plenam ætatē non respondebit, licet petere possit aliquando in causa proprietatis ante plenam ætatem viginti et unius anni, secundum quod tenementum fuerit socagium vel feodum militare, et cùm warrantia propter ætatem suspendatur, merito debet esse in suspenso usque ad plenam ætatem placitum principale.

2. Fallit hoc quandoque propter finem factum, vel si antecessor minoris obiit seysitus ut de feodo, quia minor respondebit ad finem.

Fallit tamen istud in casibus tum propter finem factum in curia domini regis, tum quia antecessor minoris non obiit seysitus ut de feodo de re, de qua vocatus est ad warrantum, in dominico nec in servitio, sed forte ad terminum annorum vel ad vitam, vel ut de vadio vel nomine custodiæ, & hujusmodi: propter finem factum, quia esto quòd A. petat versus B. tantam terram cum pertinentiis &c., et B. vocet inde ad warrantum C. qui nolit respōdere infra ætatem, quia antecessor suus obiit inde seysitus ut de feodo. Si B. proferat cyrographum vel finem factum in curia domini regis inter ipsum & prædictum C. vel inter eorum antecessores, tunc quamvis idem C. infra ætatem existat, respondebit ad finem illum, quod de facili reprobari non poterit, & ꝓcedetur ad judicium de warrantizatione, licet ad simplicē chartam, vel ad

not peremptied, but it lasts, when the foundation still lasts, to wit, the principal plea, upon which may be constructed a building, as if, when the principal parties, to wit, the claimant and the tenant last, the warrantor dies. But if any of the parties or both the principal parties dies, the principal cause falls and the entire foundation, and consequently the incidental plea concerning the warranty. But a warranty is suspended for a time on account of the minority of the warrantor himself in a plea of property, as if a father or mother, or other ancestor, has died seysed of a tenement as of fee, in which case the minor, whether he be one or several, shall not answer before he is of full age, although he may claim sometimes in a cause of property before the full age of twenty-one years, according as the tenement is a socage tenement or a military fee, as when a warranty is suspended on account of age, the principal plea ought to be deservedly suspended until full age.

for a time on account of minority or on account of death.

This, however, fails in cases, as well on account of a fine having been made in the court of the lord the king, as because the ancestor of the minor has not died seysed as of fee of the estate, concerning which he is vouched to warrant in domain or in service, but by chance for a term of years or for life, or as for a security or in the name of guardianship and such like: on account of a fine having been made, because let it be that A. claims against B. so much land with its appurtenances, &c., and B. thereupon vouches C. to warrant, who is unwilling to answer, being under age, because his ancestor died seysed of it as of fee. If B. produces a chirograph or a fine made in the court of the lord the king between himself and the aforesaid C. or between their ancestors, then although the said C. be under age, he shall answer to that fine, which cannot well be repudiated, and proceedings shall be had to a judgment concerning the warranting, although to a simple charter or to homage

2. This however fails sometimes on account of a fine having been made, or if the ancestor of the minor has died seysed as of fee, because a minor shall answer to a fine.

homagium, vel servitium infra ætatem non teneatur respondere, sed in hoc casu respectum habebit respondendi tam de warrantizatione versus B. qm de principali placito versus A.

3. Cum minor warrantizaverit propter finem, non respondebit petenti ante ætatem.

Sed si finis & cyrographū intervenerit, ætas ipsius C. nō expectabitur versus B. qui ipsum vocavit ad warrantū ꝑpter finē illū, quin statim warrantizet, nō expectata ætate sua, quia ad finē factū respondebit quilibet minor, etsi non esset nisi unius anni, et cùm C. sic warrantizaverit ipsi B. expectabitur ætas sua versus ipsum A. qui petit de placito principali, & sic videtur prima facie q in uno et eodē placito expectatur ætas & nō expectatur, q quidē verū est, sed tamen secundum diversos respectus, cùm hic sint duo placita, unum vz. principale, q est inter ipsum A. & B., & aliud incidens, q est inter B. et C. de warrantia.

4. Videtur quod teneatur respondere de quibus antecessor non obiit seysitus ut de feodo, si vice versa non teneatur respondere de quibus obiit seysitus ut de feodo.

f. 392 b.

Itē cū minor nō teneatur de aliquo respōdere, de quo pater vel mater vel alius antecessor obiit seysitus ut de feodo in dominico vel in servitio, ante plenam ætatē, ꝑterquàm ad finem factum (ut predictum est), videtur à contrario sensu quòd respondere debeat tam ad warrantiam, quàm ad principale placitum, de omnibus de quibus non obiit seysitus ut de feodo nec in servitio nec in dominico, sicut sunt ea de quibus paulò ante dictum est. Et unde sive placita sint per breve de recto, sive assisæ sicut mortis antecessoris, et aliæ hujusmodi in quibus ostendi poterit quod antecessor minoris, qui vocatus est ad warrantum, non obiit seysitus de re petita ut de feodo, nec in dominico nec in servitio, ad warrantiā respondere tenebitur, & post warrantiam ad placitum principale, non obstante minori ætate. Si autē inde seysitus obiit ut de feodo, in

or to service he shall not be bound to answer whilst under age, but in this case he shall have regard to answer as well concerning the warranting to B. as concerning the principal plea towards A.

3. When a minor has warranted on account of a fine, he shall not answer to the claimant whilst he is under age.

But if a fine and a chirograph have intervened, the full age of the said C. shall not be awaited as regards the said B., who has vouched him to warrant on account of that fine, so that he should not warrant immediately, without awaiting his full age, because any minor can answer to a fine having been made, although he should not be more than one year old; and when C. has so warranted to B., his full age shall be awaited as regards the said A., who claims in the principal plea, and so it seems at first sight that in one and the same plea full age is awaited and is not awaited, which indeed is true, but nevertheless in different respects, since there are here two pleas, one, to wit, the principal, which is between A. and B., and the other incidental, which is between B. and C. concerning a warranty.

4. It seems that he is bound to answer concerning tenements of which his ancestor did not die seysed as of fee, f. 392 b. if on the reverse he is not bound to answer concerning tenements of which he died seysed as of fee.

Likewise since a minor is not bound to answer concerning any tenement of which his father or mother or other ancestor died seysed as of fee in domain or in service before he is of full age except upon a fine having been made, as aforesaid, it seems in a contrary sense that he ought to answer as well to the warranty as to the principal plea, concerning all tenements of which he did not die seysed as of fee, neither in service nor in domain, as are those tenements of which we have before spoken. And hence whether they be pleas by a writ of right or assises of mortdancester or others of that kind in which it can be shown that the ancestor of the minor, who has been vouched to warrant, did not die seysed of the estate claimed as of fee, neither in domain nor in service, he will be bound to answer to the warranty, and after the warranty to the principal plea, notwithstanding his minority. But if he died seysed thereof as of fee, in

dominico vel in servitio, aliud erit. Et de hac materia dicetur plenius infra de exceptionibus, ubi dicitur ad quæ debet minor respõdere, et ad quæ non.

Infra, fol. 421 b.

5. Suspenditur quandoque per mortem warranti.

Suspenditur autem quandoq̃ warrantia per mortem warranti, ubi scilicet quis vocatus fuerit ad warrantum et obierit antequàm warrantizaverit, vel postqm warrãtizaverit, vel quãdocunq̃, dum tamen ante juditiũ et loquelã terminatam inter ipsum et principalẽ dominũ petentẽ. Et quo casu, sive hæres ejus infra ætatem fuerit sive non, non ꝑpter hoc cadit loquela, nec ex toto erit reincipienda per mortem warranti, cùm semel warrantizaverit, & in se sùsceperit defensionẽ: et ꝑ hoc fit quasi tenens, cûm adhuc duret fundamentum, scilicet petens et tenens, ut supradictum est, inter quos vertitur contentio, et ideo de novo vocetur hæres ejus ad warrantum, qui obiit. Et q̃ hæres vocari debeat, ꝑbatur in rotulo de terñ Paschæ, anno regni regis Henrici decimosexto in comitatu Kanc., de Aiicia de Bendenges. Ad idẽ facit q̃ habetis de terñ Trinitatis anno regni regis Henrici octavo in principio rotuli. Et q̃ dicitur de hærede, observari debet de successore, sicut episcopis, abbatibus et prioribus: ut de terñ Paschæ anno regni regis Henrici septimo in comitatu Devoñ de Wilhelñ Paynel & abbate de Doneckswell, & sic non peribit lis, quamvis pereat instantia litis.

6. Si quis duos vel plures vocaverit ad warrantum, ut si

Item esto quòd quis duos vel plures vocaverit ad warrantum, sicut virum & uxorem, verbi gratia: A. petit versus B. terram, B. vocat inde ad warrantum C. & D. uxorem ejus, qui veniunt et warrantizant, & vocant inde ad warrantũ E., & pendente placito war-

domain or in service, it will be otherwise. And concerning this there will be a fuller statement below concerning exceptions, where it is stated to what things a minor ought to answer and to what things not so.

5. It is suspended sometimes through the death of the warrantor.

But the warranty is sometimes suspended through the death of the warrantor, where a person has been vouched to warrant and has died before he has warranted, or after he has warranted, provided it be before the judgment and the termination of the trial between him and the principal lord claiming. And in which case, whether his heir be under age or not, the trial does not on that account fall, nor will it have to be entirely recommenced through the death of the warrantor, when he has once warranted and has taken upon himself the defence, and has thereby become a kind of tenant, since the foundation still endures, to wit, the claimant and the tenant, as abovesaid, between whom the contest turns, and therefore let the heir of him who has died be vouched anew to warrant. And that the heir ought to be vouched is proved in the roll of Easter term in the sixteenth year of the reign of king Henry in the county of Kent, concerning Alicia de Bendenger. To the same effect is what you have in Trinity term in the eighth year of the reign of king Henry at the commencement of the roll. And what is said of the heir, ought to be observed in the case of a successor, as bishops, abbots, and priors: as in Easter term in the seventh year of king Henry in the county of Devon, concerning Wilhelm Paynel and the abbot of Donecks-well, and so the suit will not perish, although the instance of the suit perishes.

6. If a person has vouched two or more persons to warrant,

Likewise let it be that a person has vouched two or more persons to warrant, as a man and his wife, for instance: A. claims against B. so much land; B. vouches thereon C. and D. his wife to warrant, who come and warrant, and vouch thereon E. to warrant, and pending

virum et uxorem.

rantiæ inter eos, moritur C. vir ipsius D. quo casu oportebit q̃ D. uxor C. de novo vocet ad warrantum ipsum E. & per novum brē, & qui non respondebit nisi ad warrantiam sine nova sum̃onitione: ut de term̃ Paschæ anno regis Hērici decimosexto in com̃ Linc., de Richardo de Elings. Sed quid si uterq̃ moriatur tam C. quàm D. tunc sum̃oneātur hæredes ipsius D. Itē esto q̃ warrātus cùm vocatus fuerit ad warrantū warrātizaverit et amiserit, sed excābiū nō fecerit in vitā sua, hæres ipsius (sine alio brevi) tenebitur excābium facere: ut de term̃ S. Trinitatis añ regis H. octavo, de Hugone de Bailol.

7. Ubi plures vocantur ad warrantum successive, refert quis prius moriatur, et in persona cujus debeat placitum warranti suscitari,

f. 393.

et unus ex principalibus personis moriatur.

Refert tamē utrū ex pluribus primus moriatur, ubi plures successivè vocati fuerint ad warrātizandū, de warranto in warrantum, et warrantizaverint usq̃ ad ultimū, et ille qui ultimò vocatus fuerit ad warrantū, sive warrantizaverit sive nō, et sive ad placitum principale respondet sive nō, dum tamē moriatur ante judiciū in principali, & quo casu erit placitum warrantiæ reincipiendum in persona hęredis ex nova sum̃onitione. Si autem judicium redditum sit, sine nova summonitione et novo brevi erit executio judicii facienda de bonis hæredis, quoad excambium. Si autē ille primus qui warrantizavit moriatur, vel tenens cui warrantizatū est, vel illi qui sunt medii, pendente placito warrantiæ inter ultimos warrantos, et aliquis ipsorū emiserit:[1] fiat escambiū hæredibus ipsius ultimi warranti, et illud idē tenenti, si superstes fuerit: si autē nō, tunc cadit principalis loquela, et erit de novo reincipienda. De warrātis vero qui medii sunt, si moriantur pendente placito warrantiæ inter ultimos

[1] "amiserit," MS. Rawl. C. 160.

the plea of warranty between them C. the husband of D. dies; in which case it will be incumbent that D. the wife of C. should vouch anew the said E. to warrant and by a new writ, and who will not answer except to the warranty without a new summons: as in Easter term in the sixteenth year of king Henry in the county of Lincoln, concerning Richard de Elings. But what if both die, as well C. as D.? then let the heirs of the said D. be summoned. Likewise let it be that a warrantor, when he has been vouched to warrant, has warranted and has lost, but has not made compensation in his life time, his heir (without another writ) shall be bound to make compensation, as in Trinity term in the eighth year of king Henry, concerning Hugo de Bailol.

as for instance a man and his wife.

7. Where several are vouched to warrant successively, it is of importance, who dies first and in whose person the plea of warranty ought to be revived, and one of the principal persons dies. f. 393.

It is of importance whether out of several the first dies, where several have been successively vouched to warrant, from warrantor to warrantor, and have warranted up to the last, and he who has been last vouched to warrant, whether he has warranted or not, and whether he answers to the principal plea or not, provided only he dies before judgment in the principal plea, and in which case the plea of warranty will have to be recommenced in the person of the heir upon a new summons. But if judgment has been rendered, without a new summons and a new writ, execution of the judgment will have to be made against the goods of the heir, as regards compensation. But if the first one who has warranted dies, or the tenant, to whom the warranty has been made, or those who are intermediate, pending the plea of warranty between the last warrantors, and one of them has lost, let compensation be made to the heirs of the said last warrantor, and the very same to the tenant, if he be surviving; but if not, then the principal trial falls and will have to be recommenced anew. But concerning the warrantors who are intermediate, if they die pending the plea of warranty between the last warrantors, this is not much to be cared

warrātos, non est multū curandū, quia eorū heredes nō versantur nec in lucro nec in damno suo quoad escambiū, ex quo ultimò vocatus non respondet ad warrantiam, sed hæres mortui qui vocavit, & qui aliis warrantizaret, si plene ætatis fuerit sum̄onitus ad warrātizandū in statu quo pater fuit, et si fuerit infra ætatem, expectetur ætas.

8. Quod remanebit totum placitum ad minorem ætatem unius warranti et post seysinam.

Si autē ibi sint plures warranti vocati, qui sunt quasi unus hæres de feoffamento antecessorum suorum, quorū unus fuerit infra ætatem, ꝑpter ætatem suā remanebit placitum warrantiæ usque ad ætatem, ac si omnes essent infra ætatem, cum distinctione supradicta. Si autē unus vel plures moriantur, et hæredes habuerint de corpore suo qui sunt infra ætatem, vel plenę ætatis, tūc sum̄oneantur hæredes in forma supradicta, & fiat ut supra. Si autē alios non habuerit nisi cohæredes quibus descendit jus defunctorum per jus accrescendi, iniquum esset et onerosum si pro parte illa, q̄ eis de novo accreverit, essent omnes summonēdi de novo, non allocatis essoniis et dilationibus suis præhabitis: cùm lites et dilationes potius restringēdæ sunt quam laxandæ. Igitur non erit de novo sum̄onitio reincipienda, sed teneat ꝑcessus secundū quod inceptus est.

9. Si plures warranti vocentur, sicut unus hæres.

Item si plures warranti simul vocentur qui sunt quasi unus hæres, tunc refert utrum ptitio facta sit inter eos vel non: Si autē non, omnes simul nominandi sunt et vocandi quasi unum corpus, et nullus sine alio respondebit. Si autem partita fuerit, tunc refert utrum feoffamentum, de quo unus vocatus est ad warrantū, factum sit à participe post partitionē, vel ante à cōmuni antecessore omniū. Si autem tantū à participe sine

for, because their heirs are not concerned neither in their gain nor in their loss as regards the compensation, since the last vouchee does not answer to the warranty, but the heir of the deceased person who vouched him, and who would warrant the others, if he was of full age, and was summoned to warrant in the state in which his father was, and if he should be under age, let his full age be awaited.

8. That the entire plea shall be stayed upon the minor age of a single warrantor and after seysine.

But if there be several warrantors vouched, who are as it were a single heir upon the feoffment of their ancestors, one of whom is under age, the plea of warranty shall be stayed on account of age until full age, just as if all were under age, with the distinction aforesaid. But if one or more die, and have heirs of their bodies, who are under age or of full age, then let the heirs be summoned in the form above said, and let it be done as above. But if they have no other heirs but coheirs, to whom the right of the deceased has descended by the right of accretion, it would be inequitable and onerous if on account of that part which has accrued to to them anew they were all to be summoned anew, without allowing them essoins and their delays being anticipated, since law suits and delays are rather to be restrained than relaxed. Therefore a summons will not have to be recommenced anew, but let the process hold according as it has been commenced.

9. If several warrantors are vouched as a single heir.

Likewise if several warrantors are vouched who are as it were a single heir, then it is of importance whether a partition has been made amongst them or not. But if not, all are to be named and vouched as if one body, and none shall answer without the other. But if there has been a partition, then it is of importance whether the feoffment, concerning which one has been vouched to warranty, has been made by a parcenary after the partition, or before by the common ancestor of all. But if only by a parcenary without the others, let him alone

aliis, ipse solus vocetur & respondeat de facto suo proprio. Si autē à communi antecessore, tunc omnes vocentur: nec expedit tantū unum nominare sed omnes, licet unus posset respondere quòd sine participibus ad warrantum non teneretur respondere, nisi sum̄onerentur ad warrantizandum cum eo.

10. Suspenditur warrantia propter dubium eventum, propter partum qui in utero est.

Suspenditur autem warrantia ꝑpter dubium eventum de warranto, ut si duo se gerant pro hærede, de quibus ante judicium constare non possit, quis eorum sit hæres legitimus. Item si mulier habens in utero partum, de quo constare non possit utrum nascatur vivus vel mortuus, vel cùm sit natus, utrum sit homo vel declinet ad monstrum.

11. Si warrantus vocatus appellatus sit de vita et membris.

Item remanet warrātia in suspenso, si quis vocatus fuerit ad warrantiā qui appellatus sit de vita & mēbris, donec cōstiterit utrum se defēdere possit vel nō de felonia: quia nō magis tenetur respondere ad warrātiā pendēte accusatione, q̄m tenetur ad placitū principale, quia subsequēte cōdēnatione, omnia q̄ cum ipso facta essent post feloniā factā, sunt irritanda et revocāda, et etiā generatio sua suscepta post feloniā exhæredāda, & ideo suspendit warrantia donec constiterit, quis ei succedere debeat post delictū.

f. 393 b.

12. De eo qui debet esse loco hæredis, ut de eschæta.

Itē idē erit, si warrantus obierit pendente placito warrantiæ, donec constiterit ad q̄m terra sua debeat reverti si obierit sine hærede, cùm talis esse debeat loco hæredis, ut de donationibus factis ante feloniam. Et si talis forte suspensus fuerit pendente warrantia

be vouched and answer for his own act. But if by the common ancestor, then let all be vouched; nor is it expedient to name one only, but all, although one only may answer that without his coparceners he is not bound to answer to the warranty, unless they be summoned to warrant together with him.

10. The warranty is suspended on account of a doubtful event, on account of an offspring which is in the womb.

But a warranty is suspended on account of a doubtful event concerning the warrantor, as if two persons hold themselves out to be the heir, concerning whom it cannot be established before a judgment, which of them is the legitimate heir. Likewise if a woman having an offspring in her womb, concerning which it cannot be established whether it will be born alive or dead, or when it shall be born, whether it shall be a human being or shall turn into a monster.

11. If a warrantor, who has been vouched, be accused of a crime entailing loss of life or of members.

Likewise the warranty remains in suspense, if a person has been vouched to warranty who is accused of a crime entailing loss of life or of members, until it has been ascertained whether he can defend himself or not from the felony; because he is not more bound to answer to the warranty during the accusation than to the principal plea, because if condemnation follows, all things, which have been done together with him after the felony has been committed, are to be made void and revoked, and even his generation, which has sprung up after the felony, is to be disinherited, and therefore the warranty is suspended until it has been ascertained, who ought to succeed to him after the offence.

f. 393 b.

12. Concerning him who ought to be in the place of an heir, as in an escheat.

Likewise it will be the same, if the warrantor has died pending the plea of warranty, until it has been ascertained to whom that land ought to revert, if he had died without an heir, since such a person ought to be in the place of an heir, as concerning donations made before a felony. And if such person shall have been hanged pending the warranty or outlawed, then

vel utlagatus, tunc eodē modo reincipiatur loquela, & in eodem statu in quo fuit quando tenens primò warrantum vocavit, cùm constiterit cujus eschaeta debeat esse hæreditas talis: ut de itinere W. de Ralegh in coñ Warř, de quodam Wilhelmo filio Roberti.

13. Refert utrum warrantus, qui obiit, tenuit in feudo vel ad vitam.

Videndum est etiam utrū warrantus, qui obiit, tenuit in feodo vel ad vitam tantum, sicut nomine dotis, vel alio modo sicut liberum tenementum, quod post mortem ipsius warranti reversurum est ad dominum ꝑprietatis. Si autē in feodo, fiat ut supradictum est, si autē ad vitā, & dominus ꝑprietatis implacitaverit, tunc non cadit breve nec loquela principalis, sed tantum placitum de warrantia, quod in personis hæredum reincipere non potest: & ꝑcedet placitum principale, ac si tenens ab initio warrantū non vocasset.

14. Poterit quis intrare gratis ad warrantum, si non vocetur ad proprii juris tuitionem.

Poterit etiam quis intrare in warrantiā, etsi non vocetur ad warrantum, ad ꝑprii juris tuitionem: ut si quis tenuerit ad vitam suam, sicut mulier nomine dotis, vel alio modo, vel ad terminum terram aliquam q̃ post vitam vel terminum reversura esset ad dominū ꝑprietatis si se in fraudem & exhæredationem ipsius permiserit implacitari ab aliquo, & cùm posset dominum ꝑprietatis inde vocare ad warrantū ad defensionem suam, hoc omiserit: bene poterit dominus ille ꝑprietatis, cùm sibi viderit exinde periculum iminere, comparere per se, & si non vocetur, intrare in warrantiam ad sui proprii juris defensionem: cùm melius & utilius sit in tempore occurrere, quàm post causam vulneratam quærere remedium, & sic malitiis hominum obviare. Quia cùm mulier, vel alius qui tenet ad vitam, sine warranto suo placitare vel respondere nō possit, statim

in the same matter let the trial be recommenced, and in the same state in which it was when the tenant first vouched a warrantor, when it has been ascertained whose escheat that inheritance ought to be, as in the iter of William de Ralegh in the county of Warwick, concerning a certain Wilhelm the son of Robert.

13. It is of importance whether the warrantor, who has died, held in fee or for life.

It is to be seen whether a warrantor, who has died, held in fee or for life only, as in the name of dower, or in any other manner as a free tenement, which after the death of the warrantor is about to revert to the lord of the property. But if he held in fee, let it be done as aforesaid, but if for life and the lord of the property has impleaded, then neither the writ falls nor the principal trial, but only the plea about the warranty, which cannot recommence in the persons of the heirs; and the principal plea shall proceed as if the tenant from the commencement had not vouched a warrantor.

14. A person may enter gratuitously into a warranty, if he be not vouched, for the protection of his own right.

A person may also enter into a warranty, although he be not vouched to warranty, for the protection of his own right; as if a person holds for his own life, as a woman in the name of dower, or in some other manner, or for a term a certain land, which after his life or after the term is to revert to the lord of the property, if he has allowed himself to be impleaded by some one in order to defraud and disinherit himself, and when he might thereupon vouch the lord of the property to warrant in his defence, he has omitted this: the lord of that property may well, when he sees danger to himself imminent, appear of himself, and if he be not vouched, enter into a warranty for the defence of his own right, since it is better and more useful to oppose in time, than to seek a remedy after the cause has been wounded, and so to meet the malice of mankind. Because when a woman or another person, who holds for life, cannot plead or answer without her warrantor

cùm implacitata fuerit de aliquo ad dotē suam ptinente, q̄ in corpore vel in jure cōsistat, vocare debet warrantū suū: ut de terr̄ S. H. & P. anno regis H. iv. circa finē, & si hoc in fraudem omiserit, vel forte defaltam facere voluerit, ille cujus interest intret in warrantiam etiam si non vocatus. Si autē, cùm warrantus vocatus fuerit, defaltam fecerit, petens recuperabit rem petitam, et tenens escambiū. Si autē tenens, & warrantus non, tunc amittit tenens, & escambium non habebit.

Cap. XI.

1. Cum warrantus se de warrantia defendere non possit, vel cum f. 394. gratis vel per judicium, tunc reincipiet petens principale placitum versus warrantum, sicut fecit versus tenentem, et eodem modo proponat intentionem.

Cum autem warrantus de warrantia defendere se non possit, quin per judicium warrantizat, vel si gratis hoc fecerit, tunc reincipiet petens placitum suum principale versus ipsum qui warrantizavit, & proponat eodē modo intentionem suam versus ipsum warrantum, sicut proposuit versus ipsum principalem tenentem, & dicat sic, q̄ injustè intrat in warrantiam, quia terra, vel res de qua agitur, est jus suum, quia talis antecessor suus inde obiit seysitus ut de feodo & jure, & sic per omnia sicut versus ipsum principalē tenentē, & sic incipit placitum esse inter petentem et warrantum, & sic tenens et alii warranti medii quibus warrantizatum est remaneant in pace, donec constiterit quid actum sit inter petentem & warrantum: & quo casu bene poterit warrantus warrantum ulteriùs vocare, si warrantum habuerit, unum vel plures, simul vel

immediately when she has been impleaded concerning something, which pertains to her dower, and which consists either in substance or in right, she ought to vouch her warrantor: as in St. Hilary term and in Easter term in the fourth year of king Henry about the end, and if she has omitted this fraudulently or by chance has wilfully made default, let him, who is interested, enter forthwith into a warranty, even if he be not vouched. But if, when he has been vouched as a warrantor, he has made default, the claimant shall recover the thing claimed, and the tenant shall have compensation. But if the tenant has made default, and the warrantor not, then the tenant loses and shall not have compensation.

Chapter XI.

1. When the warrantor cannot defend himself from a warranty when he warrants either through a judgment or gratuitously, then let the claimant recommence the principal plea against the warrantor, as he did against the tenant, and let him in the same manner

But when the warrantor cannot defend himself from a warranty, but that he must through a judgment warrant, or if he has so done gratuitously, then let the claimant recommence his principal plea against him who has warranted, and let him propound in the same manner his declaration against the warrantor himself, as he has propounded it against the principal tenant, f. 394. and let him say thus, that he enters unjustly into a warranty, because the land or the thing which is in question is his right, because so-and-so his ancestor died seysed of it as of fee and of right, and so throughout as against the said principal tenant, and so the plea commences to be between the claimant and the tenant, and so let the tenant and the other intermediate warrantors, to whom a warranty has been made, remain in peace, until it has been ascertained what has been settled between the claimant and the warrantor, and in which case the warrantor may well call a further warrantor, if he has a warrantor, one or more, together or successively, and in which case, if the warrantor

successivè: & quo casu, si warrantus sum̄oniri debeat, nulla fiat mentio in sum̄onitione de tenente nec de warrantis mediis, quibus warrantizatum est, sed dicatur.

2. Si ille qui warrantizaverit ulterius vocat warrantum, tunc fiat ei tale breve pro auxilio suo.

Rex vicecomiti salutē. Sum̄oneas per bonos summonitores A. q̄ sit coram justitiariis &c. ad warrantizandum B., scilicet warranto qui ultimò warrantizavit, tantam terram, &c. q̄m C. in curia nostra coram justiciariis &c. clamat ut jus suū versus ipsum B., & unde B. in eadem curia &c. vocavit ipsum A. ad warrantum versus ipsum C.: & qualiter ulterius de warrantis sit procedendum, si vocati fuerint, satis perpendi poterit ex p̄missis.

3. Si ille qui vocatur ad warrantum non tenuit nisi ad vitam, quando feoffavit, et mortuo eo qui vocatus est.

Item esto quòd ille, qui vocatus est ad warrantum, non tenuit rem petitam nisi ad vitam suam, & antequam warrantizaverit moriatur, & terra reverti debeat ad dominū p̄prietatis qui petit, non cadit breve principale, nec warrantia, sed reincipiat placitum warrantiæ in persona hæredis, si ille qui ad vitam tenuit feoffavit in feodo. Si autem ad vitam suam, tunc cadit omninò warrantia & tenebit placitum principale. Si autē ad vitam tenentis, tunc tenebit warrātia: & de hac materia supra de donationibus.

4. Cum ultimus warrantus ulterius warrantum vocare noluerit, tunc statim defendat jus petentis.

Cùm autē ille, qui ultimò warrantizavit, warrantū ulteriùs vocare voluerit,[1] vel non possit, tūc aut statim defendit jus ipsius petentis & seysinam & totum p̄ corpus liberi hominis sui, et per duellum, vel ponat se in magnam assisam, vel rem petitam recognoscit petenti cum voluntate tenentis, nisi exceptiones habeat contra petentem quas p̄ponat. Et sunt exceptiones com̄unes quæ competunt tam tenenti quàm warranto, et quas ipse warrantus proponat si voluerit. Sunt etiam quædamexc ep tiones q̄ cōpetunt tantum tenenti

[1] "noluerit" MS. Rawl. C. 160.

ought to be summoned, let no mention be made in the summons concerning the tenant nor concerning the intermediate warrantors, to whom a warranty has been made, but let it be said: propound his declaration.

The king to the viscount greeting. Summon by good summoners A. that he present himself before justiciaries &c. to warrant to B., to wit, the warrantor who has last warranted, so much land &c. which C. in our court before justiciaries &c. claims as his right against the said B. and whereon B. in our said court &c. has vouched the said A. to warrant against the said C.: and in what manner further proceedings are to be had concerning the warrantors, if they be vouched, may be sufficiently understood from the premises. 2. If he, who has warranted, further vouches a warrantor, then let a writ of this kind be issued to him for the aid of the court.

Likewise let it be, that he who is vouched to warrant did not hold the land claimed except for his life, and he dies before he has warranted, and the land ought to revert to the lord of the property who claims it, the principal writ does not fall, nor the warranty, but the plea of warranty should recommence in the person of the heir, if he who held for life, has enfeoffed it in fee. But if for his own life, then the warranty fails altogether and the principal plea shall hold. But if for the life of the tenant, then the warranty shall hold; and on this matter we have spoken above concerning donations. 3. If he who is vouched to warrant, did not hold except for life when he enfeoffed, and he who is vouched is dead.

But when he, who has last warranted, is unwilling or is unable to vouch further a warrantor, then he either forthwith contests the right of the claimant himself, and his seysine and the whole by the body of his free man and by a duel, or let him put himself on a great assise, or he acknowledges the thing claimed to belong to the claimant with the consent of the tenant, unless he has exceptions against the claimant which he may propound. And there are common exceptions, which are appropriate to the tenant as well as to the warrantor, and which the warrantor may propound, if he will. For there are some exceptions which are appropriate only to the claimant 4. When the last warrantor has not wished to vouch further a warrantor, then let him contest forthwith the right of the claimant.

et non warranto, quas quidem non ꝑponat warrantus, & e contrario, quia etsi aliquando cōpetat exceptio contra aliquem, non pertinet ad omnes qui illam proponant, nisi ad ipsum tantum cujus interest. Et unde videtur, quòd ad illum cuī warrantizavit non cōpetant exceptiones, quæ propositæ fuerint à principali tenente, & per judicium cassatæ, vel quibus ipse tenens tacitè renuntiavit, vocando warrantum scilicet antequam illas ꝑponeret, sicut contra breve de errore & hujusmodi, si ita sit quòd tacita renuntiatio tenentis principalis nocere possit warranto.

f. 394 b.

Cap. XII.

1. Proposita intentione contra warrantum, si warrantus visum petat, denegabitur ei.

Proposita autem intentione petentis (ut p̃dictum est) si warrātus visum petat, denegabitur ei: quia aut scit aut scire debet qm terram tenenti suo warrantizavit, et de qua t̃ra homagiū ceperit & servitiū. Si excipiat & dicat q̄ totam t̃ram petitam n̄ō teneat, de qua vocatus est ad warrantū, nō valebit ei, quia non tenetur ei ad majus escambiū. Et visu ei denegato, si dicat q̄ totam terram illam petitam nō teneat, de qua vocatus est ad warrantum, sive tenens primò illam ꝑposuerit sive non, & licet totā warrantizare debeat, quamvis tenens totam nō teneat, talē exceptionem ꝑponendo nō audietur, cùm ad majus escambium non teneatur principali tenenti, quàm ipse tenens tunc tenuerit, quando warrantus per judiciū amisit, licet ista exceptio ab initio competeret ipsi tenenti contra petentē.

and not to the warrantor, which indeed the warrantor should not propound, and on the contrary, because although an exception is sometimes appropriate as against a person, it does not pertain to all persons to propound it, except only to him who has an interest in the case. And hence it seems that exceptions are not appropriate to him who has warranted, which have been propounded by the principal tenant and which have been overruled by a judgment, or which the tenant himself has tacitly renounced, by vouching a warrantor before he has propounded them, as against the writ on the ground of error or such like, if it be so that the tacit renunciation of the principal tenant can be prejudicial to a warrantor.

Chapter XII.

f. 394 b.

1. The declaration having been propounded against a warrantor, if he claims a view, it shall be denied to him.

But upon the declaration of the claimant having been propounded (as said above), if the warrantor claims a view, it shall be denied to him, because he either knows or he ought to know what land he has warranted to his tenant, and of what land he has received homage and service. If he should except, and say that he does not hold all the land claimed, concerning which he is vouched to warrant, it will not avail him, because he is not bound to make him a greater compensation. And upon a view having been denied to him, if he should say that he does not hold all that land claimed, concerning which he is vouched to warrant, whether the tenant has at first propounded it or not, and although he ought to warrant the whole, although the tenant does not hold the whole, concerning which he is vouched to warrant, he shall not be heard in propounding such an exception, since he is not bound to a greater compensation towards the principal tenant, than the tenant himself held at the time when the warrantor lost by a judgment, although that exception from the commencement was available for the tenant himself against the claimant.

2. Si warranto competat alia exceptio, quæ primo non competierit principali tenenti, proponatur illa incontinenti.

Si autē sint exceptiones vel defensiones, q̃ cōpetant ipsi warranto, & q̃ prius nō cōpetierunt ipsi principali tenenti, tunc illas ꝑponat warrantus, ut si finis in curia dñi regis et cyrographum factum fuit inter ipsum warrantum et petentē, vel eorū antecessores, per quem finem ipse petens vel ejus antecessores remiserunt, vel quietū clamaverūt ipsi warranto, vel ejus antecessoribus totū jus suū q̃ habuit in t̃ra illa petita, vel si antecessores petētis, vel ipse petens feloniam vel quid tale fecit, ꝑpter q̃ terra illa fuit eschaeta ipsius warranti vel antecessorum suorum. Item si recognitio, & redditio, donatio vel venditio, cum warrantia expressa, vel ꝑ homagio & servitio intervenit, vel si forte antecessores ipsius petentis terram illam amiserint versus warrantū per judiciū, vel per magnā assisam vel per duellum vel ejus hæredes. Et plures possunt esse hujusmodi exceptiones warranto cōpetentes, q̃ non competunt principali tenenti, & unde cûm warrantus per hujusmodi exceptiones vel per duellum vel ꝑ magnā assisam, vocantem legitimè defenderit, retinebit tenens seysinam suam, & petens in misericordia remanebit.

Cap. XIII.

1. Si nulla sit exceptio vel defensio de escambio rehabendo, et cum warrantus tenentem suum defendere non possit.

Si autem non sit exceptio, nec defensio, sicut duellum vel magna assisa per quam possit warrantus tenentem suum defendere, secundum quod inferius dicetur, amittet tenens terram petitam, & warrantus ei tenebitur ad escambium, quatenus habuerit de hæreditate ejus, ratione cujus vocatus fuerit ad warrantum.

2. If an other exception is available for the warrantor, which may not have been at first available for the principal tenant, let it be propounded immediately.

But if there be exceptions and defences which are available for the warrantor himself, and which were not previously available for the principal tenant himself, let the warrantor then propound them, as if a fine in the court of the king and a chirograph has been made between the said warrantor and the claimant, or between their ancestors, by which fine the said claimant or his ancestors have remitted or quit-claimed to the said warrantor or to his ancestors all his right, which he had in the land claimed, or if the ancestors of the claimant or the claimant himself has committed a felony or something of the kind, on account whereof that land has been an escheat of the said warrantor or of his ancestors. Likewise if a recognition and surrender, a donation or a sale with an express warranty or for homage and service has intervened, or if by chance the ancestors of the said claimant have lost that land to the warrantor through a judgment, or through a great assise or through a duel, or to his heirs; and there may be several exceptions of this kind available for the warrantor, which are not available for the principal tenant, and hence when the warrantor by exceptions of this kind or by a duel or by a great assise has legitimately defended the voucher, the tenant will retain his seysine and the claimant will be liable to be amerced.

Chapter XIII.

1. If there be no exception or defence against recovering compensation, and when the warrantor cannot defend his tenant.

But if there be no exception nor defence, as a duel or a great assise, through which a warrantor may defend his tenant, according to what will be said below, the tenant shall lose the land claimed, and the warrantor shall be bound to him to make compensation, as far as he may have land of the inheritance of the person, by reason of whom he has been vouched as a warrantor.

2. Non tenetur quis factum patris warrantizare, vel escambium facere de hæreditate matris, vel e contrario.

Non enim tenetur quis factum patris, vel matris, vel alterius antecessoris (cujus hæres ipse fuerit) warrantizare, vel escambium facere de suo perquisito. Itē nec de hæreditate matris warrantizare debeat quis, vel escambium facere dē hæreditate patris, vel ēconverso de hæreditate patris warrantizare debet quis, vel escambium facere de hæreditate matris. Ut de itinere episcopi Dunholm̃ & M. de P. in com̃ Eborum anno regis H. iii. circa medium rotuli. Et quod donum patris warrantizare debeat de hæreditate patris, inveniri poterit in eodem rotulo de eodem itinere, de Wilhelmo de Vavasour: ubi hæres satis habuit ad warrantizandum de hæreditate patris. Si autē nō habeat unde totum, sed partem, fiat excambium quatenus fieri possit, & de residuo expectet tenens tempora meliora. Si autē nihil, non erit omninô absolvendus de escambio, dum tamen sit aliquid q̃ ei accidere possit de hæreditate ejus, ratione cujus vocatus fuerit ad warrantum.

f. 395.

3. Si warrantus tenuerit de domino rege per warrantiam.

Itē quamvis quis teneatur ad warrantiam, ad escambium tamen non tenetur ratione rei quam tenet, licet ei hæreditarie descendat, ut si teneat de dño rege in capite per servitium quod dividi nō potest, ut per serjeantiam, ne dominus rex cogatur servitium suum & officium servientis recipere per particulas, cùm particularis solutio multa habet incom̄oda, & q̃ revocari & coadjuvari debet si fuerit dispersa, nisi ita sit q̃ ille, qui serjeantiam vel ejus partem alienaverit, tantum retinuerit q̃ sufficere possit ad plenum servitium. Et q̃ dictum est de serjeantia, dici poterit de aliis feodis

2. A person is not bound to warrant the act of his father, or to make compensation from the inheritance of his mother, or the contrary.

For a person is not bound to warrant the act of his father or of his mother or any other ancestor (whose heir he may be) or to make compensation from his own acquired property. Likewise he is not bound to warrant for the inheritance of his mother, or to make compensation from the inheritance of his father, or conversely to warrant for the inheritance of his father and to make compensation from the inheritance of his mother, as in the iter of the bishop of Durham and Martin de Pateshull in the county of York, in the third year of king Henry, about the middle of the roll. And that he ought to warrant the donation of his father from the inheritance of his father, may be found in the same roll of the same iter concerning Wilhelmus de Vavasour, where the heir had enough to warrant for the inheritance of his father. But if he have not wherefrom to warrant for the whole, but only for a part, let there be compensation as far as it can be made, and for the residue let the tenant await better times. But if he should have nothing, he will not however have to be altogether absolved from compensation, provided however there be something which may descend to him from the inheritance of the person, in respect of whom he has been vouched to warrant. f. 395.

3. If the warrantor holds from the lord the king by a warranty.

Likewise although a person may be bound to a warranty, he is not however bound to make compensation in respect of that which he holds, although it may descend to him by inheritance, as if he should hold of the king in chief by a service, which cannot be divided, as by serjeanty, lest the king should be obliged to receive the service or the duty of the person serving by parts, when the performance of it in parts would be inconvenient, and which ought to be revoked and united together if it has been dispersed, unless it so be that he, who has alienated the serjeanty or a part of it, has retained so much as may be sufficient for a complete service. And what has been said of serjeanty, may be said of other feuds which are held in chief of the crown.

quæ tenentur de domino rege in capite. Si autem de excambio fieri debet extensio & estimatio, estimari debet res quæ admittitur in eo statu, in quo fuit quando primô data fuit. Item nec si ille, qui warrantum vocavit, aliquid adjecit de alterius feodo, nō enim admittitur melioratio tenentis qui amisit: ut si post feoffamentum suū ipse vel antecessores sui ibi ampla construxerit ædificia, sicut castra, parcos vel vivaria. Et si plures sint warranti qui amiserint, quilibet contribuat ad escambiū ꝑ portione virili, & fiat excambiū & extensio per hoc breve.

4. Si de escambio fieri debet extensio.

Rex vic. salutem. Scias ꝙ cùm A. in curia nr̃a &c. peteret versus B. tantam terram cum pertiñ &c. ut supra. Idem B. venit in eadē curia & vocavit inde ad warrātum C. et qui venit in eadē curia et ei warrantizavit, et postea ꝑ judicium ejusdē curiæ nostræ terram illam amisit versus p̃dictum A., q̃ quidē per rationabilem extensionē inde factam ꝑ p̃ceptum nostrum in com̃ tali, valet per annū x. ł. Et ideô tibi p̃cipimus ꝙ de terra ipsius C. in comitatu tuo eidem B. in excambium p̃dictæ terræ sine dilatione habere facias et assignari x. libratas terræ ꝑ visum legaliū hominū de comitatu tuo, & per rationabilē extensionē, et quid et ubi et ꝑ quas ꝑticulas terram illam ei assignaveris, nobis scire facias per literas tuas sigillatas, et per duos ex illis, ꝑ quorū sacramentum extensio illa et assignatio facta fuit, & habeas ibi hoc breve et nomina eorum per quorū &c. Teste &c. Et si causetur extensio, fiat sicut alibi de extensionibus.

5. Casus, ubi quis habere possit ip-

Poterit etiam quis in casu habere ipsam rem principalem, & nihilominus escambiū, verbi gratia. Dominus capitalis, cū in possessione fuerit alicujus t̃re

But if there ought to be an extent and an estimate of the compensation, the estate which is admitted ought to be estimated in that state, in which it was when it was first given. Likewise neither if he who has vouched a warrantor has added anything from another person's feud, for the amelioration of the tenant who has lost is not admitted; as if after his own enfeoffment he or his ancestors have built there ample edifices, such as castles, parks, or fish ponds. And if there be several warrantors who have lost, let each contribute a portion for his own share towards the compensation, and let there be made a compensation and an extent through a writ of this kind.

4. If an extension should be made concerning the compensation.

The king to the viscount greeting. Know thou that when A. in our court, &c., claimed against B. so much land with its appurtenances, &c., as above, the said B. came into our said court and vouched thereon C. to warrant, and who came into our said court and warranted to him, and afterwards by a judgment of the said court lost that land to the said A., which indeed by a reasonable extent made thereof through our precept in our county is worth forty pounds by the year. And therefore we enjoin you that from the land of the said C. in your county you cause compensation for the aforesaid land to be made without delay to the said B., and ten pounds worth of land to be assigned to him by the view of loyal men of your county, and by a reasonable extent, and what and where and by what parts you will have assigned that land to him cause us to know by your sealed letters and by two of those persons, by whose oath that extent and assignment has been made, and have there this writ and the name of those by whose oath, &c. Witness, &c. And if the extent be called in question, let it be done as in other extents.

5. A case where a person

A person may also in a case have the principal estate itself and nevertheless compensation, as for instance: A chief lord, when he is in possession of a certain land

sam rem principalem et nihilominus excambium.

ratione custodiæ de duobus fratribus, feoffat postnatū de eadē terra, primogenitus ꝑfert assisam mortis sup fratrē postnatum, & ipse vocat ad warrantum capitalē dominum, & cùm ipse warrantizaverit recuperet antenatus seysinam versus eum, & ipse dominus capitalis facit postnato excambium, mortuo autem antenato sine hærede de se seysiat dominus capitalis terram in manū suam, frater postnatus petit illā versus eum per assisam mortis antecessoris de morte fratris sui, objicit ei dominus suus capitalis q̄ non potest petere terram, cùm inde habeat excambiū: revera poterit diversis respectibus, terram in dominico ꝑpter descensum, & escambium similiter retinere ꝑpter feoffamentum, & sic utrumq̄, tamen ex diversis causis.

f. 395 b.

Cap. XIV.

1. Si tenens warrantum vocaverit, qui manens sit extra regnum, et nihil habuerit in regno per quod distringi possit.

Dictum est de illis qui warrantum vocant per auxilium curiæ infra regnum, & ubi dominus rex districtionem habeat, ut vocatus veniat ad warrantizandum. Nunc autem dicendum si tenens warrantum vocaverit, qui sit manens extra regnum, & nihil habuerit in regno Anglię per quod distringatur, et tunc refert si extra regnum, is rex habuerit potestatē vel non ad distringendum talem, quòd si nullam, sicut in potestate regis Franciæ, vel Alemaniæ, vel hujusmodi, licet auxilium tenenti concedatur, non valebit: sed oportebit tenentem talem ꝑducere si voluerit, quia auxilium non habebit, alioquin in defaltam remanebit, debet etiam illos ꝑducere sine auxilio curiæ, quos habuerit sub potestate sua, quamvis infra regnum manentes sint, & sub regis coercione, sicut uxorē ꝑpriam, & liberos

by reason of the wardship of two brothers, enfeoffs the after-born of the said land, the elder-born brings an assise of mortdancester against his after-born brother, and vouches the chief lord to warrant, and when he has warranted let the elder-born recover the seysine against him, and let the lord himself make compensation to the after-born, but upon the death of the elder-born without an heir of his body, the chief lord seizes the land into his own hand, the after-born brother claims that land against him by an assise of mortdancester upon the death of his brother, the chief lord objects to him that he cannot claim the land, since he has compensation for it: in truth he can claim the land in different respects, in domain on account of the descent, and in like manner retain the compensation on account of the enfeoffment, and so both, nevertheless for different causes.

may have the principal estate itself and nevertheless compensation.

f. 395 b.

Chapter XIV.

We have spoken of those who vouch a warrantor by the aid of the court within the kingdom, and where the lord the king has a distraint, that the vouchee may come to warrant. Now however we must speak if a tenant has vouched a warrantor, who is resident out of the kingdom, and has nothing in the kingdom of England through which he may be distrained, and then it is of importance, if he be out of the kingdom, if the king has power or not to distrain such a person, but if he has none, as being in the power of the king of France or of Germany or such like, although aid be granted to the tenant, it will not avail; but it will be incumbent upon the tenant to produce such person, if he wishes, because he will not have aid, otherwise he will remain in default, he ought also to produce without the aid of the court those whom he has under his power, although they may be resident within the kingdom, and under the coercion of the king, as his own wife and his own children and

1. If a tenant has vouched a warrantor, who is resident out of the kingdom, and has nothing in the kingdom which can be distrained.

ꝑprios, & alios quibus possit imperare. Esto etiam q̄ cùm tenens implacitatus fuerit in Anglia, warrantū vocaverit qui manens sit in Hybernia,[1] vel in Wallia, sub potestate regis, & ubi brevia sua currunt, et hoc per auxilium curiæ. Videtur q̄ ei dari debet auxilium, et placitum principale in suspenso manere, & sine die, quousq̄ in Hybernia[1] discussum fuerit de placito warrantiæ, et q̄ tenens sequatur placitum de warrantia, vel q̄ per defaltam amittat, & fiat breve dñi regis justiciariis suis in Hibernia in hac forma.

2. Breve si implacitatus in Anglia warrantum vocaverit, qui manet in Hibernia.

Rex dilecto & fideli suo tali justic. Hyberniæ[2] salutē. Scias q̄ cùm A. in curia nostra coram justiciariis nostris apud Westm̄ peteret versus B. tantam terrā &c. ut jus suum, idem B. venit in eadem curia nostra &c. et dixit q̄ terram illam tenuit de dono C. vel alicujus antecessoris ipsius C. cujus hæres ipse C. est per chartam suam quam obtulit & ibi ostendit, & vocavit inde ad warrantum prædictum C. versus eundem A. per auxilium ejusdem curiæ nostræ, & quia idem C. manens sit in Hybernia[1] sub potestate nostra, et nullam terram habet in Anglia ubi sum̄oniri possit & distringi, vobis mandamus quòd summoniri faciatis predictum C. certis die & loco secundum quod videritis expedire, ad warrantizandum prædicto B. prædictam terram, vel ad ostendendum quare warrantizare non debeat, & recordū illius loquelæ de prædicta warrantia, secundum quod coram vobis deducta fuerit, nobis sine dilatione scire faciatis per literas vestras sigillatas, & remittatis nobis breve istud simul cum recordo. Et si prædictus C. warrantizare debeat, detis ei diem coram nobis ad audiendum recordum et judicium suum de warrantia prædicta, & ad respondendum eidem A. in placito principali. T. &c.

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[1] "Hibernia," MS. Rawl. C. 160. [2] "Hiberniæ," MS. id.

others whom he can command. Let it be also that when the tenant has been impleaded in England, he has called a warrantor who is resident in Ireland or in Wales under the power of the king and where his writs run, and this by the aid of the court. It seems that aid ought to be given to him, and the principal plea ought to remain in suspense, and without a day, until it has been discussed in Ireland concerning the plea of warranty, and that the tenant should follow up the plea of warranty, or that he should lose by default, and let a writ of the lord the king issue to his justiciaries in Ireland in this form.

2. A writ, if a person impleaded in England has vouched a warrantor who remains in Ireland.

The king to his beloved and faithful so-and-so, justiciary of Ireland, greeting. Know that when A. in our court before our justiciaries at Westminster has claimed against B. so much land &c. as his right, the said B. came into our court &c. and said that he held that land from the gift of C. or some ancestor of the said C. whose heir C. is, by his charter which he produced and there exhibited, and he vouched thereon to warrant the aforesaid C. against the said A. through the aid of our said court, and because the said C. is resident in Ireland under our power, and has no land in England where he can be summoned and distrained, we command you that you cause to be summoned the aforesaid C. on a certain day and at a certain place according as you shall see it to be expedient, to warrant to the aforesaid B. the aforesaid land, or to show wherefore he ought not to warrant, and cause us to know by your sealed letters without delay a record of the trial concerning the said warranty, according as it has been brought before you, and remit to us this writ at the same time with the record. And if the aforesaid C. ought to warrant, give him a day before us to hear the record and his judgment concerning the aforesaid warranty and to make answer to the said A. in the principal plea. Witness &c.

f. 396.

3. Si warrantus non venerit, nec tenentem suum warrantizaverit.

Et quo casu si C. in Angliam nō venerit, nec tenentē suū defenderit versus A., A. recuperet terram petitam versus B., & B. de terra ipsius C. in Hybernia[1] habebit escambiū ad valentiā. Sed si cùm C. venerit in Angliā & defenderit B. versus A., B. tenebit in pace, & C. quietus erit de escambio. Sed esto quòd cùm C. in Anglia warrantizaverit forte warrantū vocaverit in Hybernia,[2] & qui nihil habet in Anglia per q̄ distringi possit, tunc fiat breve eodem modo quo supra, et q̄ contineat totum recordum cum utraq̃ warrantia, et sic in infinitum.

4. Si implacitatus in Hibernia warrantum vocaverit, qui manens sit in Anglia.

Et vice versa fiat de Hybernia[3] in Anglia, nisi sit qui dicat q̄ īmediatè distringi debet warrantus, q̄ veniat in Angliam ad warrantizandū cum suis dilationibus. Sed si sit aliqua libertas ubi non currat breve dñi regis, mandetur eodē modo dño libertatis, ut prædictum est, vel distringatur q̄ faciat eum venire ad warrantizandū p̄ terras suas, infra libertatē vel extra nō refert, quia rex qui libertatē dat, potestatē regiam servituti non supponit, quamvis illam de gratia in parte restringat.

Cap. XV.

1. Si warrantus contenderit de warrantia, et charta producatur calumniata, et petens se posuerit super patriam et

Item cùm ille qui ad warrantum vocatus est contendere velit de warrantia, & ille qui vocavit chartam p̄ferat p̄ se in judicio, et contra quē exceptum sit, q̄ minus sufficiens sit vel falsa, oportebit eum qui p̄fert chartam docere illam esse sufficientem & veram. Ut si scripturæ et signo contradicatur, & defendatur donū illud, & ille qui chartam p̄fert dicat esse donum ritè factum, & chartam esse validam, et inde ponat se

[1] "Hibernia," MS. Rawl. C. 160.
[2] "in Hiberuia," MS. id.
[3] "de Hibernia," MS. id.

f. 396.

3. If the warrantor has not come, and has not warranted.

And in which case if C. has not come to England nor has defended his tenant against A., let A. recover the land claimed against B., and B. shall have an equivalent compensation from the land of C. in Ireland. But if when C. has come into England and has defended B. against A. B. shall hold in peace and C. shall be acquitted of compensation. But let it be that when C. has come into England, he has by chance vouched a warrantor in Ireland, and who has nothing by which he can be distrained, then let a writ issue in the same manner as above, and which shall contain the entire record with each warranty, and so to infinity.

4. If a person impleaded in Ireland has vouched a warrantor, who is resident in England.

And conversely let it be done from Ireland to England, unless there be some one who says that the warrantor ought to be forthwith distrained that he should come into England to warrant with his delays. But if there be any franchise, where the writ of the king does not run, let it be commanded in the same manner to the lord of that franchise, as aforesaid, or let him be distrained that he may cause him to come to warrant through his own lands, whether within the franchise or without it does not matter, because the king, who grants the franchise does not subject the royal power to a servitude, although he restricts it partially of grace.

Chapter XV.

1. If the warrantor disputes a warranty, and a charter is produced, which is impeached, and the claimant has put himself on the country

Likewise when he who is vouched to warrant desires to dispute a warranty, and he who has vouched him produces a charter on his behalf in judgment, and against whom an exception is taken that it is insufficient or false, it will be incumbent upon him who produces the charter to show that it is sufficient and true. As if the writing and signature be contradicted and the gift be denied, and he who produces the charter says that the gift has been rightly made and that the charter is valid, and thereon puts himself upon the country and upon the

testes in brevi nominatos.

sup patriam & super testes in charta nominatos. Et tunc fiat inde inquisitio & per tale breve. Rex vic. salutem, sum̄oneas per bonos sum̄onitores A. B. C. testes in charta nominatos quā D. in curia nostra coram justiciariis nostris &c. ꝑfert sub nomine E. de tanta terra cum pertinentiis in tali villa, et p̄terea xii. tam milites quâm alios legales, liberos & discretos homines de visneto tali, q̄ sint coram justic. nostris, tali loco, tali die, ad recognoscendum super sacramentum suum, si p̄dictus E. terram illam dedit prædicto D. et chartam suā ei inde fecit, et homagium suum inde cepit, & ipsum D. inde in seysinam posuit, sicut idem D. dicit, vel non, quòd tam prædictus D. quàm ipse E. posuerunt se inde in juratam illam, et ita se inde interim certificent, q̄ præfatos justic. nostros ad p̄fatum terminum pleniûs inde certificare possunt, & habeas ibi nomina militū et hoc bŕe. Teste &c.

f. 396 b.

2. Summoneantur testes, sed quid, si manentes in diversis comitatibus.

Si vero testes fuerint in diversis comitatibus manentes, tunc fiat bŕe interlaqueatum singulis vic. in hac forma, ita q̄ milites assumantur de com̄ illo ubi terra sita est. Rex vicecomiti salutē. Sum̄oneas per bonos sum̄onitores A. B. C. testes nominatos ut supra. Et præterea octo tam milites q̄m alios &c. ut supra, q̄ sint tali die &c. ad recognoscendum super sacramentum suum simul cum D. E. F. aliis testibus nominatis in eadē charta, et simul cum octo vel duodecim liberis et legalibus hominibus de alio tali com̄ (et sic de pluribus com̄ si testes & milites sint evocādi) ad recognoscendū super sacramentū suum &c. ut supra.

3. Si charta bona sit in se et recognita pro

Item eodem modo si charta recognita fuerit, scilicet scriptura & signum, sed contra chartam excipiatur q̄ valere non debeat, quia facta fuit dū donator fuit

witnesses named in the charter. And then let there be an inquest held thereon and by a writ of this kind: The king to the viscount greeting. Summon by good summoners A. B. C. the witnesses named in the charter which D. produces in our court before our justiciaries &c. under the name of E. concerning so much land with its appurtenances in such a vill, and besides twelve as well knights as other loyal men, free and discreet, of such a visne, that they be before our justiciaries at such a place on such a day to recognise in their oath, if the aforesaid E. has given that land to the aforesaid D. and made a charter thereof for him, and taken his homage thereof, and had put the said D. into seysine thereof, as the said D. says, or not so, that as well the aforesaid D. as the said E. have put themselves thereon on that jury, and so let them in the mean while ascertain for themselves, that they may be able to certify more fully thereon our justiciaries at the aforesaid term, and have there the names of the knights and this writ. Witness &c.

and the witnesses named in the charter.

But if the witnesses be resident in different counties, then let an interlaced writ be issued to the individual viscounts in this form, so that knights be assumed from the county where the land is situated. The king to the viscount greeting. Summon by good summoners A. B. C. the witnesses named as above. And besides eight as well knights as others &c. as above, that they be on such a day &c. to recognise upon their oath together with D. E. F. the other witnesses named in the said charter and together with eight or twelve free and loyal men of such other county (and so of several counties if the witnesses and knights are to be called out of it) to recognise upon their oath &c. as above.

f. 396 b.

2. Let the witnesses be summoned, but what if they be resident in different counties?

Likewise in the same manner if the charter shall have been recognised, to wit, the writing and the signature, but exception be taken against the charter, that it ought not to avail, because it was made whilst the donor was

3. If the charter be good in itself and is recog-

bona, sed cum donator non fuit compos sui nec sanæ mentis, quando fecit donum illud.

impotens sui, vel nō sanæ mētis, vel postquā memoriam amisit in infirmitate qua obiit, vel dum donator fuit infra ætatē constitutus, vel dū fuit in vinculis detentus donator, fuit charta illa per vim & per metum extorta, & ubi ipse donator reclamavit, cùm potuit. Itē si per dolū, ut si donatorius fecit sibi chartam de feoffamento, ubi fecisse debuit cyrographum de terr̃. Itē ubi charta fieri debuit ad vitam, fecit illam in feodo & hujusmodi. Dum tamen nihil sit q̃ imputari possit imperitiæ suæ vel negligentiæ, ut si sigillum suum seneschallo suo vel uxori traderet, q̃ cautiûs custodiri debuit, cùm uxor & sigilla ad paria judicentur, & hujusmodi secundum varietatem recordorum, et quo casu oportebit ipsum qui chartam p̃fert, docere cōtrariam et p̃bare, scilicet q̃ donator fuit compos mentis suæ, & bonæ memoriæ, et plenæ ætatis, et hujusmodi, et exempli causa fiat inquisitio in singulis casibus in hac forma.

4. Inquisitio, si fuit sanæ mentis.

Rex vicecomiti salutem. Summoneas per bonos summonitores A. & B. testes nominatos &c. & p̃terea octo tam milites &c. ut supra, ad recognoscendum super sacramentum suum si prædictus C. in ligea potestate sua, et dum fuit compos sui, vel bonæ memoriæ, vel sanæ mētis et cōpos sui, dedit p̃dicto B. tantam terram cum p̃tinētiis in tali villa, vel advocationē talis ecclesiæ, vel aliud quid tale, et chartam suam ei inde fecit vel nō. Et unde E. filius & hæres p̃dicti C. (versus quem p̃dictus B. in curia nostra &c. clamavit p̃dictam terram, vel p̃dictam advocationē, vel aliud quid tale) dicit quòd prædictus talis pater suus, vel alius antecessor, nunquam dedit p̃dictam terram, advocationē, vel quid tale prædicto B., et si hoc unquam fecit, hoc fuit in infirmitate sua, de qua idem talis antecessor obiit, et postquam memoriā

not master of his faculties or not of sound mind, or after he had lost his memory in an infirmity under which he died, or whilst the donor was still under age, or whilst he was detained in chains, the charter was extorted from him through force and fear, and where the donor has reclaimed, as soon as he was able. Likewise if through deceit, as if the donatory has made a charter of feoffment, when he ought to have made a charter for a term. Likewise, when the charter ought to have been made for life, he has made it of the fee and such like. Provided however there be nothing that can be imputed to his unskilfulness or negligence, as if he delivered his seal to his steward or to his wife, which ought to have been kept in more secure custody, since a wife and seals are judged on a parity, and such like according to the variety of records, and in which case it will be incumbent upon him who produces the charter, to assert the contrary and to prove, to wit, that the donor was master of his faculties and of good memory and of full age and such like, and for example's sake let an inquest be made in this form.

nised as good, but when the donor was not master of his faculties, nor was of sound mind, when he made the gift.

4. An inquest, if he be of sound mind.

The king to the viscount greeting. Summon by good summoners A. and B. the witnesses named &c., and besides eight as well knights &c. as above, to recognise upon their oath, if the aforesaid C. in his liege power and when he was in his full senses and of good memory and of sound mind and master of himself gave to the aforesaid B. so much land with the appurtenances in such a vill, or the advowson of such a church, or something else of the same kind, and made a charter thereof to him or not. And whereupon E. the son and heir of the aforesaid C. (against whom the aforesaid B. in our court &c. has claimed the aforesaid land or the aforesaid advowson or something else of the same kind) says that his aforesaid father or other ancestor, never gave the aforesaid land advowson, or other thing of the same kind to the aforesaid B., and if he ever did so, it was during his infirmity, of which such ancestor died, and after he had lost his

amiserit, & dum aut non fuit sanæ mentis vel dum fuit infra ætatē in custodia ipsius antecessoris, ut idem C. dicit, quia tam p̃dict[2] C. quàm p̃dictus D. posuerunt se &c. ut supra.

5. Si per testes de consensu partium.

Et quandoquè fit inquisitio tantum per testes, et quandoquè per alios quam per testes, si partes hoc voluerint, hoc tamen observato, quòd si per alios quâm per testes fieri debeat inquisitio, semper in fine addatur hęc clausula: & interim terram illam videant, ecclesiam illam, vel aliud quid tale. Item aliter: Ad recognoscendū &c. Si p̃dictus C. in bona voluntate sua & sponte dedit ipso[1] D. terram illam vel quid tale, ut idem D. dicit, vel si hoc fecit coactus et per metum sicut idem C. dicit, & si hoc fecit coactus &
f. 397. per metum, tunc diligenter inquiras qualem metū et qualē coactionē idē talis ad hoc exhibuit, et inquisitionē &c. Item aliter: Ad recognoscendum &c. Si A. pater B. dedit C. tantam terram cum pertinentiis in tali villa, et eum inde in seysinam posuit, et ita q̃ per donum illud fuit inde in seysina positus in vita ipsius A. per tantum tēpus. Et si idem C. postea dimisit terram illam p̃dicto A. patri ipsius B. ad firmam vel ad vitam, vel si idem A. semp fuit inde seysina,[2] et inde obiit seysitus ut de feodo absq̃ aliqua seysina quam idem C. inde haberet in vita ipsius A. vel non, quia tam p̃dictus B. quàm p̃dictus C. inter quos contentio est de p̃dicta t̃ra posuerunt se inde in inquisitionem illam. Et notandum q̃ hujusmodi inquisitiones locū habent generaliter et ubiq̃ ubi contentio habita est de chartis et donationibus factis per chartas.

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[1] "ipsi," MS. Rawl. C. 160. | [2] seysitus, MS. id.

memory and whilst either he was not of sound mind, or whilst he was under age in the guardianship of the said ancestor, as the said C. asserts, because the aforesaid C. as well as the aforesaid D. have put themselves &c. as above.

And sometimes let there be an inquest only through the witnesses, and sometimes through other persons if the parties wish it, this however being observed that if the inquest is to be made through others than the witnesses, there should always be added at the end this clause: "and meanwhile let them view the land, or the "church, or anything else of the kind." Likewise otherwise: to recognise &c. if the aforesaid C. in his good will and of his own accord has given to the said D. the land or something of the kind, as the said D. says, or if he did thus under compulsion and fear as the said C. says; and if he did it through compulsion and fear, then do thou diligently enquire as to what sort of fear and what sort of compulsion the said so-and-so used for this purpose, and the inquest &c. Likewise otherwise; to recognise &c. if A. the father of B. gave to C. so much land with its appurtenances in such a vill, and put him into seysine thereof, and so that he was put into seysine thereof in the lifetime of the said A. during such a time. And if the said C. afterwards demised the said land to the aforesaid A. the father of the said B. for a term or for life, or if the said A. has always been in seysine thereof, and died seysed thereof as of fee without any seysine which the said C. had thereof in the lifetime of the said A., or not, because the aforesaid B. as well as the aforesaid C., between whom the contention is concerning the said land, have put themselves upon the said inquest. And it is to be noted that inquests of this sort have place generally and in all cases wherever a contest arises concerning charters and donations made through charters.

5

If by witnesses with the consent of the parties.

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6. Si res una data fuerit duobus, tunc inquiratur de prioritate.

Si quis autē unicam rem dederit duobus, et contentio habeatur de prioritate, quis eorum habuerit primā seysinam, vel si quis dederit advocationem alicui, post donationem illam dicat donator se p̃sentasse ad ecclesiā illam, et donatorius q̄ non, tunc fiat inquisitio tam de prioritate doni quàm de p̃sentatione p̄ hoc breve.

7. Si advocatio data fuerit duobus.

Rex vicecom̃ salutē. Præcipimus tibi, q̄ venire facias coram justiciariis nostris &c. tali die, tali loco duodecim tam milites q̄m alios liberos et legales homines de visneto tali, per quos rei veritas &c. et tales qui non sunt essoniabiles, ad recognoscendum &c. Si A. antecessor B. uxoris talis postquā idē A. dederit C. advocationem illius ecclesiæ, et postquàm chartam suam (q̄m inde habet) ei fecit, p̃sentavit D. ad eandē ecclesiam ita q̄ ad p̃sentationem suam fuit admissus, et ultimò obiit in eadem ecclesia p̄sona, vel non, quia tam talis quâm B. uxor ejus q̄m idem C. inter quos contentio est de eadem advocatione, posuerunt se inde in juratam illam, et similiter ad recognoscendum super sacramentum suum simul cum D. E. F. testibus nominatis in charta, quam prædictus A. fecit tali abbati de eadem advocatione, et simul cum G. et H. testibus nominatis in charta, quam idem A. fecit tali abbati de eadem advocatione, videlicet utrum predictus A. prius dedit advocationem illam prædicto tali & B. uxori suæ vel prædicto abbati. Et interim ecclesiam illam videant, & se ita inde interim certificent, q̄ p̃fatos justiciarios nostros &c. et habeas ibi nomina recognitorum et hoc breve. Teste &c. Si autem fieri

But if any one has given a single thing to two persons, and a contention arises concerning priority as to which of them has had the first seysine; or if any person has given an advowson to a certain person, and after the donation the donor says that he has presented to the said church, and the donatory that he has not done so, then let there be an inquest concerning the priority of the donation, as concerning the presentation by a writ of this kind.

6. If one thing has been given to two persons, then let an inquest be held as to the priority.

The king to the viscount greeting. We enjoin you, that you cause to come before our justiciaries &c. on such a day at such a place twelve as well knights as other free and loyal men of such a visne, through whom the truth of the thing &c. and such as are not essoinable, to recognise &c. If A. the ancestor of B. the wife of so-and-so after the said A. has given to C. the advowson of the said church, and after he made for him his said charter (which he has thereof) presented D. to the same church so that he was admitted upon his presentation, and ultimately died the parson of the said church, or not, because so-and-so as well as B. his wife as well as the said C. between whom a contention exists concerning the said advowson, have put themselves thereon upon the said jury, and similarly to recognise upon his oath together with D. E. F. the witnesses named in the charter, which the aforesaid A. made to abbot so-and-so concerning the said advowson, and together with G. and H. the witnesses named in the charter, which the said A. made to the said abbot concerning the said advowson, to wit, whether the aforesaid A. previously gave that advowson to so-and-so aforesaid and to B. his wife or to the aforesaid abbot. And in the meantime let them view that church and certify themselves thereon in the meantime in such a manner that they may certify our aforesaid justiciaries &c., and have there the names of the recognisors and this writ. Witness &c. But if the inquest

7. If an advowson has been given to two persons.

debeat inquisitio de prioritate per testes, et per patriam, tunc fiat sic.

8. Si inquisitio fieri debeat per testes et per patriam.

Rex vicecomiti salutem. Præcipimus tibi q venire facias coram justic. &c. A. & B. testes nominatos in charta quam C. fecit priori & canonicis talibus de advocatione talis ecclesiæ, ad recognoscendum super sacramentum suum simul cum xii. tam militibus qm aliis &c. Et simul cum E. F. G. testibus in charta nominatis, quam idem C. fecit tali abbati & conventui de eadem advocatione, utrum scilicet prædictus C. prius dedit advocationem illam prædicto priori, & chartam suam ei inde fecit, vel prædicto abbati, & interim &c. ut supra. Et sic sit aliquando inquisitio de prioritate donationis, & aliquando de seysina et prima præsentatione. Cûm autem fieri debet aliquando inquisitio in comitatu & non coram justiciariis, tunc fiat breve in hac forma.

f. 397 b.

9. Si fieri debeat inquisitio in comitatu, et non coram justiciariis.

Rex vicec. salutē. Præcipimus tibi q venire facias coram te & custodibus placitorum coronæ nostræ in pleno com̃ tuo A. B. C. testes nominatos in charta &c. ut supra. Et p̃terea xii. tam milites &c. ut supra de visneto tali p quos rei veritas &c. et qui D. & E. nulla affinitate attingant, & qui nullo modo sunt essoniabiles, & per eorū sacramētum diligenter inquiras, si p̃dictus E. &c. ut supra, quia tam p̃dictus D. quàm p̃dictus E. posuerunt se inde in juratam illam, et inquisitionē inde feceris, scire facias justic. &c. ad talē terminum, evidenter, distincte et aperte p literas tuas sigillatas sigillo tuo, et sigillis p̃dictorū custodum placitorum coronæ nostræ, et per quatuor vel duos legales et discretos homines ex illis, p quorum sacramētū inquisitionē illā feceris, & habeas ibi hoc breve et

concerning priority ought to be made through witnesses and through the country, then let it be thus:

8. If the inquest ought to be made through witnesses and through the country.

The king to the viscount greeting. We enjoin you that you cause to come before the justiciaries &c. A. and B. the witnesses named in the charter, which C. made to the prior and canons of such a place concerning the advowson of such a church, to recognise upon their oath together with twelve as well knights as others &c. And at the same time with E. F. G. the witnesses named in the charter, which the said C. has made for such abbot and convent concerning the said advowson, whether forsooth the aforesaid C. has previously given that advowson to the aforesaid prior, and has made his charter thereof for him, or to the aforesaid abbot, and meanwhile &c. as above. And so sometimes an inquest is made concerning the priority of the donation, and sometimes concerning the seysine and first presentation. But when the inquest ought to be made sometimes in the county court and not before the justiciaries, then let a writ issue in this form.

f. 397 b.

9. If an inquest ought to be made in the county court, and not before the justiciaries.

The king to the viscount greeting. We enjoin you that you should cause to come before you and the keepers of the pleas of our crown in your full county court A. B. C. the witnesses named in the charter, &c. as above, and besides twelve as well knights &c. as above, from such a visne, through whom the truth of the matter, &c. and who do not touch D. and E. by any affinity, and who in no manner are essoinable, and through their oath you should diligently inquire if the aforesaid E. &c. as above, because as well the aforesaid D. as the aforesaid E. have put themselves on that jury, and that you have held an inquest thereon make known to the justiciaries &c. at such a term evidently, distinctly, and openly by your letters sealed with your seal and with the seals of the aforesaid keepers of the pleas of our crown, and by four or two loyal and discreet men of them, by whose oath you will have made that inquest, and have there this writ and the names

nomina eorum, p quorū sacramentum inquisitionem illam feceris. Teste &c.

10. Si testes manentes sint in diversis comitatibus.

Si vero testes degentes sint in diversis coñ, oportet q omnes testes conveniant corā vic. cui demandata fuerit inquisitio facienda, et tunc fiat breve interlaqueatū ut supra in hac forma. Rex vic. Essex salutē. Præcipimus tibi q venire facias corā te et custodibus placitorum coronæ nostræ ad diē certū et locū secundum q videris magis expedire quādo ad hoc intendere possis A. B. C. testes nominatos in charta, quam D. in curia nostra coram justic. nostris &c. profert sub nomine E. et p̃terea octo vel xii. tam milites quàm alios liberos et legales homines &c. et p eorum sacramentū &c. et similiter p sacramentū F. et G. testium nominatorum in eadem charta de coñ Sussex, et similiter xii. tam militū qm aliorū &c. de eodē coñ quos vic. noster Sussex coram te venire faciat, & etiam per sacramentum H. et I. testium nominatorum in eadē charta de coñ Surrey, & p̃terea viii. tam militum quàm aliorum &c. de eodem coñ quos vic. noster Surrey coram te venire faciat, diligenter inquiras si p̃dictus &c. ut supra. Et inquisitionem quam inde feceris scire facias & c. ut supra. Mandavimus enim præfatis vic. nostris Sussex et Surrey q p̃fatos testes et recognitores coram te venire faciant ad diē et locum quem eis scire feceris, et habeas ibi hoc breve et nomina eorum &c. ut supra. Breve autē quod sequitur fiet in hac forma.

11. Si in comitatu, breve interlaqueatum.

Rex vic. Sussex vel Surrey salutē. Præcipimus tibi q ad diē et locum, q̃m vic. noster Essex tibi scire faciet, venire facias coram eo A. et B. testes nominatos in charta qm D. in curia nr̃a coram justic. &c.

of those persons, through whose oath you have made that inquest. Witness, &c.

10. If the witnesses are resident in different counties.

But if the witnesses are resident in different counties, it is incumbent that all the witneses should be convened before the viscount to whom the holding of the inquest has been committed, and then let an interlaced writ issue as above in this form. The king to the viscount of Essex greeting, We enjoin you that you cause to appear before yourself and the keepers of the pleas of our crown on a certain day and at a certain place, according as you may see it to be most expedient when you can attend to this, A. B. and C. the witnesses named in the charter, which D. in our court before our justiciaries, &c. produces under the name of E., and besides eight or twelve as well knights as other free and loyal men &c., and by their oath &c., and in like manner by the oath of F. and G. the witnesses named in the said charter from the county of Sussex; and in like manner of twelve as well knights as others and of the said county, whom our viscount of Sussex should cause to appear before you; and also by the oath of H. and I. witnesses named in the said charter from the county of Surrey, and besides of eight as well knights as others &c. of the said county, whom our viscount of Surrey has caused to appear before you, you should diligently inquire if the aforesaid &c. as above. And make known the inquest which you shall have made thereon. We have likewise commanded our said viscounts of Sussex and of Surrey that they should cause the aforesaid witnesses and recognisors to come before you on a day and at a place which you shall have made known to them, and have there this writ and their names, &c. as above. But let the writ which follows be in this form.

11. If in a county an interlaced writ.

The king to the viscount of Sussex or of Surrey greeting. We enjoin you that on a day and at a place, which our viscount of Essex shall make known to you, you cause to come before him A. and B. the witnesses named in the charter, which D. in our court before our

ꝑfert sub nomine E. &c. ut supra, ꝑterea octo vel xii. tam milites quàm alios &c. de coñ tuo ꝑ quos rei veritas &c. ad recognoscendū suꝑ sacramentū suum simul cum F. et G. de coñ Surrey aliis testib[9] nominatis in eadē charta, et simul cum octo tam militibus &c. de eodem coñ, & sic de pluribus coñ, si testes fuerint in diversis et pluribus coñ degentes sic: ꝑdictus E. &c. ut supra. Et ita se inde interim certificent, quòd præfatum vic. nostrum Essex inde plenius certificare possunt, et habeas &c. Teste &c. Et consimilia brevia fiant aliâs[1] vic. Si autem testes et recognitores non venerint ad diem eis datum, tunc ꝑcipiatur vic. sicut prius ꝑ breve quòd sic incipiat.

12. Si testes et recogni- f. 398. tores non venerint ad primum diem.

Rex[2] vic. salutē. Bene recolimus aliàs tibi præcepisse, quòd ad diem et locum quem vic. noster talis tibi scire faceret venire faceres &c. Et ꝑ omnia ut supra. Et in fine brevis addatur istud cōminatorium, s. et ita te habeas in hoc negotio, ne nos ad te graviter capere debeamus.

13. Quod variantur, hujusmodi inquisitiones secundum varietatem placitorum.

Variātur autē hujusmodi inquisitiones multipliciter, secundum varietatem placitorum, et partium responsiones, sicut sæpius contingit in assisis et in brevibus de ingressu, ut si unus dicat q̄ terrā teneat in feodo, et alius q̄ nō nisi ad terminū vitæ vel annorū et hujusmodi, secundū q̄ superius dicitur in tractatu de ingressu.

14. Cum comparuerint testes et recognitores.

Cùm autē in curia cōparuerint testes et recognitores, et facto sacramento dicant se interfuisse ubi donatio facta fuit, et sub eorū ꝑsentia charta donationis lecta et audita, et homagiū captū et seysina donatorio legitime facta in eorū ꝑsentia et cum debita solennitate,

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[1] "aliis vicecomitibus," MS. Rawl. C. 160.

[2] "tali vicecomiti," MS. id.

justiciaries &c. produces under the name of E. &c. as above, besides eight or twelve as well knights as others &c. of your county through whom the truth of the matter &c., to recognise on their oath as well with F. and G. of the county of Surrey other witnesses named in the same charter, and together with eight as well knights &c. of the same county, and so of several counties, if the witnesses are resident in several different counties, as the aforesaid E. &c. as above. And let them so certify themselves thereon in the meanwhile, that they may be able the more fully to certify our said viscount of Essex, and have there, &c. Witness &c. And let there be similar writs issued to the other viscounts. But if the witnesses and recognisors have not come on the day given to them, then let it be enjoined to the viscount as before by a writ which shall begin thus.

12. If the witnesses and recognisors have not come on the first day. f. 398.

The king to the viscount greeting. We well recollect to have otherwise enjoined you that, on a day and at a place which so-and-so our viscount would make known to you, you should cause to come &c., and throughout as above. And at the end of the writ let there be added this comminatory, to wit, and so conduct yourself in this business that we should not be obliged to take grave notice of you.

13. That inquisitions of this kind are varied according to the variety of the pleas.

But inquests of this kind are varied in manifold ways according to the variety of the pleas, and the answers of the parties, as often happens in assises and in writs of entry, as if one should say that he holds the land in fee, and another that he only holds it for a term of life or of years or such like, according to what has been said above in the treatise on entry.

14. When the witnesses and the recognisors have appeared.

But when the witnesses and recognisors have appeared, and having taken an oath say that they were present when the donation was made, and that in their presence the charter of donation was read aloud, and homage was taken from and seysine given to the donatory in their presence and with due solemnity, the charter will be

valida erit charta et donatio erit legitima. Si autē sic dicant et loquātur de auditu, q audiverint dici q charta facta fuit et homagiū captum, sed nullus eorum tunc ibi præsens fuit, sed præsentes fuerint ubi seysina facta fuerit donatorio per seneschallum, vel per nuntium, per fustī, vel per baculum, vel per haspam, et q donatorius inductus fuit in vacuam possessionem, ita q nullus ibi remansit ex parte donatoris, valebit donatio ut supra. De hac materia inveniri poterit de terñ Sancti Hilarii anno regni regis Henrici decimo quarto de Rogero de Danudeser et Matilda uxore ejus, qui per judicium warrantizaverit in cōsimili casu. Si autē dicant se interfuisse ubi donatio facta fuit et charta, et homagium captum, sed de seysina nihil sciverint, ꝑbatur charta legitima, sed donatio erit invalida, quia nihil ꝑbant de seysina. Et vice versa fieri poterit, si seysinam probaverint legitimam, q donatio erit valida, licet nihil ꝑbaverint de homagio capto, nec de charta: ut si testes et juratores dicant, q chartā illam nunquā antea viderunt, nec unquam audita fuit in coñ nec hundredo, licet dicant q rogati fuerint q essent testes, tamen non valebit charta: ut de termino Paschæ añ regni regis Henrici duodecimo in coñ Hunt̃ de Ægidio de Merk. Item erit si dicant se nunquam interfuisse confectioni chartæ, nec recitationi, hoc enim multum derogat chartæ et ipsius fidei: ut de ultimo itinere M. de P. in coñ Suffolk, assisa novæ disseysinæ si Mabilla. Itē si omnes testes dicāt, vel si omnes p̃ter unum vel duos dicant se nihil scire de charta et chartæ cōfectione, et unus vel duo dicant q nihil sciant de chartà nec de donatione, sed dicant

valid and the donation will be legitimate. But if they say and speak thus of the hearing, that they have heard it said that the charter was made and the homage taken, but none of them were there present, but they were present when seysine was given to the donatory by the seneschal or by a commissioner, by a staff, or a rod, or by a hasp, and that the donatory was inducted into a vacant possession, so that no one remained there on behalf of the donor, the donation will avail as above. On this matter a case will be found in St. Hilary term in the fourteenth year of the reign of king Henry, concerning Roger de Danudeser and Matilda his wife, who by a judgment warranted in a similar case. But if they say that they were present when the donation and the charter were made and homage taken, but they know nothing about the seysine, the charter is proved to be legitimate, but the donation will be invalid, because they prove nothing concerning the seysine. And the converse may result, if they have proved a legitimate seysine, that the donation will be valid, although they can prove nothing concerning the taking of homage or concerning the charter: as if the witnesses and jurors should say that they never saw that charter before, nor had it ever been read in the county court or in the hundred court, although they may say that they were asked to be witnesses, notwithstanding the charter will not be valid: as in Easter term in the twelfth year of the reign of king Henry in the county of Huntingdon, concerning Egidius de Merk. The same will result, if they should say that they were never present at the making of the charter nor at the reading of it, for this derogates much from the charter and its credit, as in the last iter of Martin de Pateshull in the county of Suffolk, an assise of novel disseysine, if Mabilla. Likewise if all the witnesses should say, or if all but one or two should say, that they know nothing about the charter or the donation, but they say that they were present when the

q̄ interfuerunt ubi cōfirmatio chartæ facta fuit, adhuc non valebit charta, ex quo nihil p̄bant de principali, s. de chartæ confectione, ut de term̄ Sancti Hilarii anno regni regis Henrici octavo in com̄ Norff. de Radulpho de Lerlinge et priore de Thefford de advocatione ecclesiæ de Russeworth. Si autē dicant testes q̄ præsentes fuerint confectioni notæ, in q̄m utraq̄ pars cōsentit donator & donatorius, hoc sufficit ad p̄bationē, licet p̄sentes nō essent ubi charta scripta fuit et assignata : ut de itinere M. de P. ad assisam novæ disseysinæ capiendā et gaolas deliberādas in com̄ Norf., jurata de consensu partium p̄ Johanne de Wanton añ regis H. octavo, et sic poterit charta esse valida et donatio nulla vel è contrariò. Si autē null⁹ testis apparet, quia omnes mortui sunt, vel extra regnū, de
f. 398 b. fide chartæ erit de necessitate ad patriam recurrendū. Sed quid si, cùm testes appareant, dicant q̄ de charta nihil sciant, vel inde dubiè respondeant, & ille qui chartam p̄fert suspectus habeatur q̄ p̄ fraudem chartam acquisiverit, quia fuit camerarius donatoris, vel p̄ fraudē uxoris, vel sit alia vehemens p̄sumptio q̄ faciat contra ipsum, non valebit charta nec donatio p̄pter p̄sumptionem, et maximè quia nihil p̄bat.

Cap. XVI.

1. Probari poterit charta alio modo,quam per testes,

Probari etiam poterit charta illo modo quàm p̄ testes et p̄ patriā, sicut p̄ collationē signorū, ut si fortè chartę contradicatur, cōferanť alia signa q̄ aliquādo in judicio p̄lata et approbata fuerint, et à

confirmation of the charter was made, still the charter will not be valid, since they prove nothing about the principal fact, namely, the making of the charter, as in St. Hilary's term in the eighth year of the reign of king Henry in the county of Norfolk, concerning Ralph of Lerlinge and the prior of Thefford concerning the advowson of the church of Russeworth. But if the witnesses should say that they were present at the making of the note to which both parties, the donor and the donatory, agreed, this suffices for proof, although they were not present when the charter was written and assigned, as in the iter of Martin de Pateshull to hold an assise of novel disseysine and of gaol delivery in the county of Norfolk, a jury with the consent of parties for John de Wanton in the eighth year of king Henry, and so a charter may be valid and the donation null, or the contrary. But if no witness appears, because all are dead or out of the realm, it will be necessary to have recourse to the country concerning the faith to be given to the charter. But what if, when the witnesses appear, they should say that they know nothing about the charter, or should answer doubtfully thereon, and he who produces the charter is a person under suspicion that he has acquired possession of the charter through fraud, because he was the chamberlain of the donor, or through the fraud of his wife, or if there be any other strong presumption which makes against him, the charter will not avail nor the donation on account of the presumption, and chiefly because it proves nothing. f. 398 b.

Chapter XVI.

A charter may be proved in another manner than by witnesses and by the country, as by a comparison of signatures, as if by chance a charter be contradicted, they may compare other signatures which have been produced and approved in court, and have been acknowledged by 1. A charter may be proved in another manner than by witnesses,

scilicet per collationem signorum, et de vitiis chartarum.

donatore recognita, et si modis omnibus conveniant et p omnia, ita q nulla in eis appareat differentia: hoc solum sufficit ad ꝓbationem chartæ, & omnia in ea contenta erunt tenenda, nisi forte aliquid in charta inveniatur q manifestam suspicionem inducat, ut si rasura facta fuerit in loco suspecto, s. in narratione facti, secus tamē si in narratione juris. Jura autem ubiq̃ scribi possunt, quia non variantur nec mutantur p rasuram. Apparere autem debet charta in prima sui figura absq̃ omni vituperatione, rasura, vel cancellatura, quia calumpniosam scripturam inde in judicio obtinere nō convenit. Sunt tamen in scripturis quædam quæ levem inducunt p̃sumptionem, quæ quidem convinci possit per veram testiū ꝓbationem in contrarium, et p patriam, ut si in scriptura inveniatur diversitas calami, & diversitas scribendi, et diversa manus, aliter enim scribit unus, & aliter alius, aliter juvenis & aliter senex: item diversitas incausti & atramenti, ut si in una pars scribatur incausto nigro, et altera pars incausto rubro, non atramento.

2. Probatur sigillum per comparationem.

Item cum sigillum ꝓbari debeat per collationē, et signa plura ꝓferantur sub nomine ejus confecta, qui ad ꝓbationē tenetur, non erit eis fides adhibenda, quia omnes possūt esse adulterina, nisi ita sit q aliq illorū prius in judicio ꝓbatū sit, et à donatore recognitū, vel à ꝓferente ꝓbatum, ut si quis fortè ĩram aliqm ab initio alicui concesserit ad terminū et ad firmam, et inde cōficiatur instrumentū et signatū, et firmarius postmodum dicat se inde esse feoffatum et inde ꝓferat chartā vel instrumentum, cui ab eo qui dimisit fuerit

the donor, and if they agree in every respect and throughout so that no difference be apparent therein, this alone suffices for proof of the charter, and all things contained in it will have to be observed, unless by chance there be something found in the charter which induces manifest suspicion, as if an erasure has been made in a suspected place, to wit, in a narration of fact, otherwise if in a narration of law. For law may be written everywhere, because it is not varied nor changed by an erasure. But a charter ought to appear in its original figure without any defect, erasure or cancellation, for it is not proper that an impeachable writing should prevail in a judgment. There are however certain things in a writing which induce a light presumption, that can be confuted by a true proof of witnesses to the contrary, and by the country, as if in the writing there be found a diversity of the pen, and a diversity of writing, and a different hand, for one writes one way, and another another way, a youth in one way, and old men in other ways: likewise a diversity of the mordant and of the black ink, as if one part be written with a black mordant, and the other with a red mordant, not with black ink.

to wit by a comparison of signatures, and concerning the vice of charters.

Likewise when the seal ought to be proved by a comparison, and many signatures are produced made under the name of him, who is bound to prove, faith is not to be given to them, because all may be adulterine, unless it be that some one of them has been previously proved in court, and has been acknowledged by the donor, or proved by the producer, as if by chance a person has granted a certain land from the commencement to a certain person for a term and for a ferm, and an instrument thereof has been made and signed, and the fermor afterwards says, that he was enfeoffed of it, and produces a charter thereof or an instrument, which has been contradicted by him who has demised the land, if he has acknowledged the term

2. A seal is proved by comparison.

contradictum, si terminum recognoverit et instrumentū de termino confectum & sigillum recognoverit, si in omnibus cōveniant sigilla tam de t̄mino quàm de feoffamento, chartam de feoffamento contradicere non poterit ꝑpter convenientiam sigillorum, nisi ita sit quòd excipere possit contra chartam vel instrumentum de dolo vel metu: et sic ꝑbantur charte & instrumenta per collationem sigillorum.

3. Si plura proferantur instrumenta.

Si vero cùm ex parte probantis plura prolata fuerint instrumenta & signa, nec sit aliquod eorum priûs à parte adversa recognitum, vel à proferente probatum, tunc de necessitate recurrendum erit ad instrumenta aliorum eodem sigillo signata vel sigillata, & quæ quidem prius recognita fuerunt vel probata, cùm utraque in se possent esse vitiosa, & sufficit si unum probetur, dum tamen utraq̄ sint convenientia.

f. 399.

Cap. XVII.

1 Aliud genus warrantiæ, sicut de warrantia chartæ.

Est etiam aliud genus warrantizationis, quæ dicitur warrātia chartæ, ubi quis de facto vel feoffamēto suo ꝑprio vel antecessorū suorū tenetur alium defendere et acquietare in seysina sua, per servitiū in charta sua nominatum, cùm ab aliis, sicut à dn̄is capitalibus districtus fuerit & vexatus fuerit ad faciendum plura servitia qm in charta exprimātur, et ubi ipse nō implacitatur de teneñto q̄ tenet, sed vexatur ut p̄dictum est: ubi hoc sit in coñ & nisi warrantum vocaverit cûm fuerit implacitatus, & quo casu currendū est ad curiam dn̄i regis, & sum̄onitur ille qui warrantizare tenetur ꝑ tale breve.

2. Breve de warrantia chartæ.

Rex vic. salutē. Præcipe tali q̄ juste & sine dilatione warrantizet tali tantum terræ cum ꝑtinentiis

and the instrument made concerning the term and has acknowledged the seal, if the seals concerning the term and concerning the enfeoffment agree in all respects, he cannot contradict the charter of enfeoffment on account of the agreement of the seals, unless it be that he may except against the charter or the instrument on the ground of deceit or fear: and thus charters and instruments are proved by the comparison of seals.

3. If several instruments are produced, by comparison.

But if several instruments and signatures are produced on the part of the prover, and there is not any of them previously recognised on the adverse side nor proved by the producer, then it will be necessary to have recourse to the instruments of others signed or sealed with the same seal, and which have been previously acknowledged or proved, since both may be vicious, and it is sufficient if one be proved, provided both agree. f. 399.

Chapter XVII.

1. Another kind of warranty, as concerning the warranty of a charter.

There is also another kind of warranting, which is called the warranty of a charter, where a person is bound by the act or the feoffment of himself or of his ancestors to defend another, and to acquit him in his seysine by a service named in the charter, when he shall have been distrained by others, as by his chief lords, and has been harassed to perform more services than are expressed in the charter, and where he himself is not impleaded concerning the tenement which he holds, but is harassed as aforesaid; where this is in the county, and unless he has vouched a warrantor, when he was impleaded, and in which case he must have recourse to the court of the lord the king, and he who is bound to warrant is summoned by a writ of this kind.

2. A writ concerning the warranty of a charter.

The king to the viscount greeting. Enjoin so-and-so that justly and without delay he should warrant to such an one so much land with its appurtenances in such a vill,

in tali villa q̃ tenet, & de eo tenere clamat, et unde chartã suam habet ut dicit; vel sic, et unde chartã talis patris vel matris, fratris vel sororis, avunculi vel amitæ, avi vel aviæ, p̃avi vel p̃aviæ talis, quamvis ipse qui queritur hæres sit valde remotus, et tunc dicatur cujus hæres ipse est ut dicit, & nisi fecerit, & talis fecerit te securum de clamore suo p̃sequendo, tunc sum̃oneas p̃ bonos sum̃onitores p̃fatum talẽ q̃ sit coram justic. nostris apud Westm̃ tali die, vel coram justic. nostris ad primam assisam cûm in p̃tes illas venerint, ostensurus quare non fecerit, & habeas ibi sum̃onitores et hoc breve. Teste &c. Ad talẽ vero sum̃onitionem bene jacebit essonium unicũ, antequam cõpareat sum̃onitus si voluerit.

3. Si non venerit attachiatus, observetur ordo attachiamentorum.

Et si nõ venerit, nec se essoniaverit, p̃pter defaltã suam nõ erit aliqua terra capienda in manũ dñi regis, sicut in warrantiis supradictis, sed attachietur p̃ vadium & salvos plegios q̃ sit ad certum diem ad warrantizadũ vel ad ostendendũ quare non, eodẽ modo quo p̃dictum est, & observetur ordo attachiamentorũ secundũ q̃ alibi observatur de attachiamẽtis donec cõparuerit; cùm autẽ comparuerit in judicio, respondere poterit contra chartã, et q̃ warrantizare nõ debeat secundum formã brevis: vel quia querens terram nõ tenet de qua petit warrantiã, vel quia chartã nõ ostenderit nec aliud quare sum̃onitus warrãtizare debeat, vel quia ipse querens nõ est hæres ipsius, sub cuius nomine petit warrantiam p̃pinquus nec remotus. Et plures aliæ sunt responsiones, secũdũ q̃ superius videri poterit per exemplum de vocatione warranti.

which he holds and claims to hold of him, and whereof he has his charter as he says; or thus, and whereof he has the charter of so-and-so his father or mother, brother or sister, uncle or aunt, grandfather or grandmother, great-grandfather or great-grandmother, although he who complains is a very remote heir, and then let it be said whose heir he is as he says, and unless he has done so, and so-and-so has given you security to pursue his claim, then summon by good summoners so-and-so aforesaid that he be before our justiciaries at Westminster on such a day, or before our justiciaries at their first assise when they have come into those parts, in order to show wherefore he has not done it, and have there the summoners and this writ. Witness &c. But to such a summons a single essoin before the party summoned has appeared, if he wishes it, will well lie.

3. If the person attached has not come, let the order of attachments be observed.

And if he has not come, nor essoined himself, his land shall not on account of his default be taken into the hand of the lord the king, as in the warranties above mentioned, but let him be attached by bail and safe sureties that he should appear on a certain day to warrant or to show wherefore not, in the same manner as above mentioned, and let the order of attachments be observed according to what is elsewhere observed concerning attachments, until he has appeared, but when he has appeared in judgment, he may answer contrary to the charter, that he is not bound to warrant according to the form of the writ, either because the complainant does not hold the land concerning which he claims a warranty, or because the charter does not show nor any other instrument, wherefore the party summoned ought to warrant, or because the complainant himself is not the heir of him under whose name he claims a warranty, neither near nor remote. And there are many other answers, according to what may be seen above by the example concerning the vouching of a warrantor.

4. Si summonitus ad warrantizandum vexaverit tenentem suum erga dominum f. 399 b. feoffatorem.

Si autē ille, qui ad warrantizandum sum̄onitus est, tenentem suū cōtra chartam suam vexaverit, & gravaverit, exigendo alia servitia vel plura qm deberet facere, sunt qui dicunt q̄ locū non habet erga dominū bf̄e de warrātia chartæ, sed bf̄e de recto de servitiis & consuetudinibus p q̄ pervenire possit ad duellum vel magnā assisam, quamvis objici poterit et sustineri, q̄ ille qui contra alios tenetur defendere tenentē suū, ipse illum contra chartam suam gravare non debet, nec ei injuriam facere, et ideo videtur q̄ teneatur de injuria per tale breve, quia qui tenetur defendere nō debet destruere, & quia, cùm quis ex officio suo alios prohibere necesse habet, idipsum in p̄sona sua committere non debet.

5. Si tenens in brevi de recto nullum habuerit warrantum, quem vocare possit vel velit, tunc ad elidendam actionem petentis tenens proponat exceptionem, si quam habuerit, et illam probet, cum quodammodo actor sit in hac parte.

Ad diem summonitionis post dilationes & essonia revertamur, ad quam cùm partes comparuerint, si non habeat tenens warrantum quem vocare potest, vel si habuerit et nullum vocat, proposita in judicio coram justic. ut prædictum est intentione petentis, et fundata, et illo eam probare offerente, ad elidendam actionem proponat tenens exceptionem si quam habuerit et illam probet, et doceat quôd exceptio ad illum pertineat, secundum quod dicitur de actionibus, et eòdem modo. Exceptiones enim loco actionum sunt. Nam qui excipit, videtur agere, quantum ad onus probationis, et respectu actionum dicuntur exceptiones, unum enim alterum impugnat, et sicut actores armantur actionibus & quasi accinguntur gladiis, ita rei e contra muniuntur exceptionibus, & defenduntur quasi clipeis.

4. If when summoned to warrant he has harassed his tenant with regard to his feoffor.

But if he who has been summoned to warrant, has harassed and aggrieved his tenant against his charter, by exacting other services or more than he ought to do, there are those who say that a writ of warranty of a charter has no place with regard to the lord, but a writ of right concerning services and customs, by means whereof he may arrive at a duel or a great assise, although it may be objected and maintained that he who is bound to defend his tenant against others, ought not himself to aggrieve him contrary to his charter, nor to do him a wrong, and accordingly it seems that he is liable to a proceeding for a wrong by a writ of this kind, because he who is bound to defend ought not to destroy, and because when a person is under a necessity as of duty bound to prohibit others, he ought not himself in his own person to do the act. f. 399 b.

5. If the tenant in a writ of right has no warrantor, whom he is able or willing to vouch, then in order to parry the action of the claimant let the tenant propound an exception, if he has any, and let him prove it, since he is in a certain manner a plaintiff in this part.

Let us revert to the day of the summons after the delays and the essoins, upon which day when the parties have appeared, if the tenant has not a warrantor whom he can vouch, or if he has one, but vouches none, the declaration of the claimant having been propounded as aforesaid before the justiciaries, and having been grounded, and upon his offering to prove it, let the tenant with a view to parry the action propound an exception, if he have any, and let him prove it, and show that the exception pertains to him, according to what has been said concerning actions, and in the same manner. For exceptions are in lieu of actions. For he who excepts, seems to be a plaintiff as far as regards the burden of proof, and exceptions are so called with respect to actions, for the one impugns the other, and as plaintiffs are armed with actions and are girt as it were with swords, so defendants on the contrary are fortified with exceptions and are defended as it were with bucklers.

TRACTATUS QUINTUS
LIBRI QUINTI,
IN
QUO TRACTATUR DE EXCEPTIONIBUS.

Cap. I.

Quid sit exceptio, et de divisione exceptionum, quod quædam dilatoriæ, quædam generales, quædam speciales.

Inprimis videndū quid sit exceptio, & qualiter dividatur, et sciendū q̄ exceptio est actionis elisio, p̄ q̄m actio perimitur vel differtur. Exceptio quidem sic dividitur. Exceptionū quædā sunt dilatoriæ, quædā peremptoriæ, et hæc est prima et brevis divisio. Itē dilatoriarum quædā sunt peremptoriæ jurisdictionis, & dilatoriæ actionis, et non peremptoriæ. Et eodem modo aliæ p̄emptorie brevis et dilatoriæ actionis. Itē quædā exceptiones sunt generales ad omnia placita sive actiones, et quædā speciales, quæ cōpetunt et dātur cōtra actiones singulares: q̃libet enim actio habet suas exceptiones appropriatas, secundum formā actionū: ut supra videri poterit de assisis et placitis de ingressu. Generales vero sunt q̃ se habēt generaliter ad oĩa placita, sicut exceptio cōtr̄ jurisdic., exceptio cōtra p̄sonā agentis, exceptio cōtr̄ br̄e, exceptio q̃ p̄venit ex tēpore secūdū diūsa geña p̄itorū: et exceptio q̃ cōpetit ratiōe loci p̄ errorē impetrationis, secundū q̄ superiûs dictū est, et q̃ sunt dilatoriæ actiones[1] et quasi extra actionē, et ideo actionē non p̄imunt, quamvis illam ad tēpus differant.

· f. 400.

[1] "actionis," MS. Rawl. C. 160.

THE FIFTH TREATISE
OF THE
FIFTH BOOK,
WHICH TREATS OF EXCEPTIONS.

Chapter I.

1. What is an exception, and concerning the division of exceptions, that some are dilatory, some are general, some are special.

In the first place we must see what is an exception, and in what manner it may be divided, and it is to be known that an exception is the parrying of an action, whereby an action is stayed or delayed. An exception indeed is thus divided. Of exceptions some are dilatory, some are peremptory, and this is the first and brief division. Likewise of dilatory exceptions some are peremptory against the jurisdiction, and are dilatory as regards the action, and not peremptory. And in the same manner others are peremptory against the writ and dilatory as regards the action. Likewise some exceptions are general against all suits or actions, and some are special, which are available and are given against single actions; for each action has its own appropriate exceptions according to the form of the actions, as may be seen above concerning assises and pleas of entry. But general exceptions are such as are applicable generally against all pleas, as an exception against the jurisdiction, an exception against the person of the plaintiff, an exception against the writ, an exception which arises extemporaneously according to the different kinds of pleas, and an exception which is f. 400. available by reason of the place through an error in the suing out, according to what has been said above, and that they are dilatory as regards the action and as it were outside the action, and accordingly they do not stay the action although they delay it for a time.

2. Quando proponendæ sint, et quando non.

Itē sunt q̃dam exceptiones ꝑponendæ in initio litis, et in p̃paratoriis judiciorū, et ante visum petendū, ad perimendum judiciū ne ꝓcedat: sicut sunt illæ q̃ proponuntur contra jurisdictionem, et contra ꝑsonas judicantiū, quibus deficit autoritas judicandi. Itē exceptiones illæ q̃ cōpetunt cōtra ꝑsonam petentis. Itē exceptiones illæ q̃ cōpetunt contra breve, quæ quidē exceptiones si in initio litis omittantur, et ad petendū visum ꝓcedatur, si tenens illas post visum petitū velit alias[1] ꝑponere, non audietur: quia per petitionem visus videtur tenens hujusmodi exceptionibus tacitè renunciasse, et in jurisdictionem judicātis cōcessisse, & q̃ omnia quoad judicium ratificandum rite ꝓcesserunt.

3. Quædam ante visum, et quædam post.

Sūt etiam q̃dam, quæ visum sequuntur et de quib⁹ certificari poterit tenens antequam petens ei visum fecerit, & certa res in judicium deducatur, de qua debeat tenens respondere, ut tunc sciri possit si totam rem petitā tenuerit, vel ejus ꝑtem vel etiam nihil, et sic fiat de ꝑtinentiis. Itē post visum competit exceptio, si error fuerit in loco ubi res sita est, de qua agitur, istæ p̃cedunt contestationē. Et quid si nullus visus petatur, tunc ꝑ ordinē proponi debent & suo loco et erit à digniori incipiendum, sicut à jurisdictione judicātis, & ꝑsona justic. cûm justic. sit pars principalis judicii. Postea vero cōtra ꝑsonam petentis, si qua cōpetat cōtra ipsam ex ꝑsona sua propria. Postea contra breve, si qua competat ex persona te-

[1] " alias " omitted, MS. Rawl. C. 159.

2. When they are to be propounded, and when not.

Likewise there are some exceptions to be propounded at the beginning of the suit, and in the preparatory stages of the judgments, and before claiming a view in order to abate the judgment that it should not proceed: such as are those which are propounded against the judgment, and against the persons judging, on the ground that they are deficient in the authority to judge. Likewise those exceptions which are available against the person of the claimant. Likewise those exceptions which are available against the writ, which exceptions indeed, if they be omitted at the beginning of the suit, and proceedings be had to claim a view, if the tenant wishes to propound other exceptions after a view has been obtained, he shall not be heard, because by claiming a view the tenant seems to have tacitly renounced exceptions of this kind, and to have consented to the jurisdiction of the person judging, and because all things as far as regards the ratification of the judgment have proceeded rightly.

3. Some before the view, and some after it.

There are also some exceptions, which follow a view, and concerning which the tenant may be certified before the claimant has given him a view and a thing certain is brought into judgment, concerning which the tenant ought to answer, that it may be then known if he has held the whole of the land claimed, or a part of it, or even none of it, and let it be so done concerning appurtenances. Likewise after a view an exception is admissible, if there has been an error in the place where the estate is situated, which is the subject of the action, and these contestations proceed. And what if no view be claimed, then they ought to be propounded in order and in their own place, and a commencement will have to be made with the more important, for instance with the jurisdiction of the judge and the person of the justiciary, since the justiciary is a principal part of the judgment. After this indeed against the person of the claimant, if any objection is applicable to the party himself as regards his own person. After this against the writ, if

nentis contra petentem, & postmodum si qua cõpetat ex ipsa re, ut si nihil inde teneat, vel non nisi ejus ꝑtem, & idem de ꝑtinentiis, & post modum si qua competat ratione loci, et cùm nulla p̃dictarũ competat, vel si illis tacitè renuntietur (ut p̃dictum est), tunc ꝑponatur illa q̃ cõpetit ratione juris, q̃ multiplex est, ut si nihil juris descẽdere posset ad petentẽ. Et sicut fit ordo petendi, sic debet fieri ordo excipiendi: ut si diceretur corã talibus justic. A. petit versus B. tantam ꝑram ꝑtinentiis[1] in tali villa ut jus suũ. Itẽ sunt duæ exceptiones q̃ proponi possunt omni tẽpore et post judiciũ, sicut judicis non sui, et falsi ꝑcuratoris, cum quibus nullũ judicium, controversia nulla. Et sicut necesse est actionem ꝑponere et fundare et ꝑbare (ut p̃dictum est), ut prima facie justa videatur, ita oportebit exceptionẽ, ut ꝑ hoc sciri possit an ꝑtineat ad excipientẽ exceptio, sicut ad agentẽ ꝑtinet actio, quia cùm aliqãdo cõtra actionẽ ꝑtineat exceptio, tamẽ (ut supradictũ est) nõ semper ꝑtinet ad omnes ut illam ꝑponant.

4. Contra exceptionem competit replicatio.

Contra exceptionẽ vero, licet ab initio cõpetens videatur, subveniri poterit petenti ope replicationis, ut si quis petat, excipere poterit tenens de pacto postea interveniente ne petat, contra ꝙm replicari poterit à petẽte de pacto posterius interposito ꝙ petat, ut si dicatur. Pact[9] ne peteret postea cõvenit ut peteret, quo casu, primũ pactũ ꝑ posteri[9] eliditur, non quidem

[1] " cum pertinentiis," MS. Rawl. C. 160.

any exception is available as regards the thing itself, as if he holds none of it, or only a part of it, and in the same manner concerning the appurtenances, and afterwards if any exception is available by reason of the place: and when none of the exceptions abovesaid are available, or if they be tacitly renounced (as aforesaid), then let that objection be propounded which is available on the ground of right, which is manifold, as for instance if no right could descend to the claimant. And as there is observed an order of claiming, so there ought to be observed an order of excepting, as if it be said against such justiciaries: A. claims against B. so much land with its appurtenances in such a vill as his right. Likewise there are two exceptions which may be propounded at all times and after judgment, as against the judge as not being the proper judge, and against the procurator as being false, with whom there is no judgment, no controversy. And as it is necessary to propound and to found and to prove the action (as said above) that it may seem at first view to be just, so it will be incumbent to do as regards the exception, that it may be thereby known whether the exception appertains to the exceptor, as the action appertains to the plaintiff, because sometimes when the exception is pertinent against the action, nevertheless (as said above) it does not always belong to every body to propound it.

4. A replication is available against an exception.

But against an exception, although at the beginning it may seems applicable, a claimant may derive help by means of a replication, as if a person claims, the tenant may except on the ground of a compact having afterwards intervened, that he should not claim, against which a replication may be made by the claimant on the ground of a compact having been subsequently interposed that he may claim, as if it be said: After a compact not to claim it was afterwards agreed that he might claim, in which case the first compact is parried by the later one, not indeed by operation of law, but by the help of a

ipso jure sed ope replicationis, & sic de similibus de modis & cōditionibus in cōtractibus appositis, ut si cōvenerit in initio cōtract[5] q quid fiat vel ne quid fiat, et fiat[1] vel non fiat, q tūc liceat contrahenti sic
f. 400 b. facere vel non sic, vel si tali modo nō fiat, q tunc sic fiat ut supra de donationibus.

5. Ad replicationem competit triplicatio.

Ad replicationē vero sequitur triplicatio, et ad triplicationem quadruplicatio ex causa, & sic ulterius in infinitum, et ita poterit ad initio[2] cōcedi quòd actio bona sit prima facie, elisa tamē p exceptionē, & eodē modo quôd exceptio bona, elisa tamen p replicationē et sic deinceps.

6. Quædam sunt perpetuæ, quædam sunt temporales.

Exceptiones vero ꝑpetuæ sunt, quamvis ex temporalibus actionibus descēdant, quia non erit in voluntate tenentis quando velit excipere, licet in voluntate actoris sit quando velit agere. Et talis ordo (secūdum q p̄dictum est) necessarius est ad ꝑponendū exceptiones, quamvis quidam illum non observāt, quia forte credunt q dum unā ante tēpus vel non suo loco ꝑposuerint cum ꝑtestatione, salvum sibi fore beneficium ceterarum indistinctè, & si in ꝑbatione unius defecerint, q possint ad alias habere recursum.

7. Quod quis potest pluribus uti.

Pluribus autē poterit quis uti exceptionibus dilatoriis, variis & diversis, dum tamen suo loco. Sed si plures peremptoriæ actionū concurrant, unam debet tenens ꝑponere & ꝑbare, sicut cōtingit superius de actionibus: ut si alicui plures competant actiones, unam debet experiri, quia si tenens, cûm duas peremtorias proponeret vel plures exceptiones, in ꝑbatione unius defi-

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[1] " et si fiat," MS. Rawl. C. 160. | [2] " ab initio," MS. id.

replication, and so of similar modes and conditions applied to contracts, as if it be agreed at the commencement of a contract that a certain thing should be done or should be not done, and if it should be done or should not be done, that it should then be lawful for the contracting party to do so or not to do so, or if it be not done in such a manner, that it should be done in such a manner, as above concerning donations. f. 400 b.

5. A triplication is available against a replication.

But upon a replication a triplication follows, and upon a triplication a quadruplication upon cause, and so further to infinity, and so it may be conceded from the commencement that the action may be at first sight good, but may be parried by an exception, and in the same manner that the exception may be good, but may be parried by a replication, and so on in succession.

6. Some are perpetual and some are temporary.

But exceptions are perpetual although they descend from temporary actions, because it will not be at the will of the tenant to except when he pleases, although it may be at the will of the plaintiff to bring an action when he pleases. And the said order (according to what has been stated above) is necessary in the propounding of exceptions, although some persons do not observe it, because they believe perhaps that when they have propounded one exception before its time or not in its proper place with a protestation, the benefit of the remaining ones will be open to them without distinction, and if they should fail in the proof of one, they may have recourse to the others.

7. That a person may use several exceptions.

A person likewise will be able to use various and diverse dilatory exceptions, provided he uses them in their proper place. But if several, which are peremptory against actions, concur, the tenant ought to propound and prove one, as happens above concerning actions: as if several actions are available to a certain person, he ought to try one, because if the tenant, when he propounds two or more peremptory exceptions, should fail

ceret, posset recursum habere ad alias, & ꝑbare sicut posset se pluribus baculis defendere, quod esse non debet, cùm ei sufficere debeat tantum probatio unius.

8. Probari poterit exceptio multis modis.

Probari autē poterit exceptio multis modis, tum per vocem mortuā, sicut per instrumenta: tum per vivam, sicut per patriam, & inquisitiones, nō per familiares et domesticos & alia ratione suspectos, sed per tales qui neutram partem aliqua affinitate attingant.

9. Non per sectam.

Itē non per sectam, quæ fieri poterit ꝑ domesticos & familiares, secta enim probationē non facit, sed levem inducit p̃sumptionē, & vincitur per ꝑbationem in contrarium, & ꝑ defensionem per legem.

10. Non per simplicem vocem.

Itē non per simplicē vocem, quia vox simplex nec ꝑbationem facit nec præsumptionē inducit. Si quis autem in ꝑbatione exceptionis vel replicationis et sic ulterius defecerit, amittet ꝑ judicium.

11. De exceptione, quæ ponitur contra jurisdictionem.

Item inprimis dicatur de una illarum, q̃ generalis est ad omnes actiones, scilicet de illa q̃ apponitur contra jurisdictionē. Et nihil aliud est jurisdictio quâm habere auctoritatē judicandi sive jus dicēdi inter ꝑtes de actionibus ꝑsonarū & rerū, secūdū q deducte fuerint in judiciū ꝑ autoritatem ordinariā vel delegatā, de quibus supradictū est de potestate judicātiū.

in the proof of one of them, he might have recourse to others and prove by them, as a person may defend himself with several cudgels, which ought not to be, since the proof of one ought to suffice.

8. An exception may be proved in many modes.

An exception likewise may be proved in many modes, as well through a dead voice, as for instance by instruments, as through a living voice, as through the country and through inquests, not through members of one's household and intimate friends and persons for other reasons open to suspicion, but through such persons who are connected with neither party by any affinity.

9. Not by a sect.

Likewise not by a sect, which may be made through members of one's household and intimate friends, for a sect does not constitute a proof, but it raises a slight presumption, and it is overcome by a proof to the contrary, and by a defence at law.

10. Not by a single voice.

Likewise not by a single voice, for a single voice does not make a proof nor found a presumption. But if a person shall have failed in the proof of his exception or replication and so further on, he shall lose by a judgment.

11. Of an exception, which is raised against the jurisdiction.

Likewise let us speak in the first place of one of the exceptions which is general in its application to all actions, namely, concerning that which is advanced against the jurisdiction. And jurisdiction is nothing else than to have the authority of judging, that is of pronouncing judgment between parties in actions against persons or things, according as they have been brought into judgment by an authority either ordinary or delegated, concerning which we have spoken above concerning the powers of those who judge.

Cap. II.

1. Quid sit jurisdictio et de ejus divisione.

Est etiam jurisdictio quędam ordinaria, quædam delegata, quæ pertinet ad sacerdotium et forum ecclesiasticum, sicut in causis spiritualibus & spiritualitati annexis. Est etiam alia jurisdictio ordinaria vel delegata, q̃ pertinet ad coronam et dignitatem regis et ad regnum in causis & placitis rerum tēporalium in foro seculari, & unde videndū cujus judicium & forum actor adire debeat, & verum est q̣ sive laicum sive clericum velit quis cōvenire, debet adire judicem & sequi forum rei, & judicē habebit illum, apud q̃m reus habet domicilium, sive domicilium habuerit sub jurisdictione unius vel duorum.

f. 401.

2. Quale forum actor sequi debet, et quæ pertineant ad forum seculare.

Et licet generaliter verum sit q̃ actor forū rei sequi debeat, fallit tamen in casibus ꝑpter diversitatē jurisdictionum & causarum de rebus spiritualibus & temporalibus et earum sequela, sicut in causa matrimoniali, & rebus præmissis ob causam matrimonii, quæ in foro ecclesiastico terminari debēt, quia cujus juris, i. jurisdictionis est principale, ejusdem juris erit accessorium. Et eodem modo sicut, si in foro seculari agatur de aliquo placito quod pertineat ad coronam & dignitatem regis, & fides fuerit apposita in cōtractu, non ꝑpter hoc ꝑtinebit cognitio super principali ad judicem ecclesiasticum.

3. Ratione criminis et ratione contractus.

Item fallit in causa testamentaria, & aliis pluribus causis ecclesiasticis. Item ratione criminis convenitur quis ubi deliquit, ut si quis crimen cōmiserit in terra

Chapter II.

1. What is jurisdiction, and concerning the division of it.

There is a certain jurisdiction ordinary, and a certain jurisdiction delegated, which pertains to the priesthood and to the ecclesiastical *forum*, as in spiritual causes and in causes connected with the spirituality. There is likewise an other jurisdiction ordinary or delegated, which pertains to the crown and to the dignity of the king as regards his kingdom in causes and pleas of temporal things in the secular *forum:* and hence it is to be seen to which judgment and *forum* a plaintiff ought to apply, and it is true, that whether a person wishes to convene a laic or a cleric, he ought to apply to the judge and sue in the court of the defendant, and he shall have that person for his judge, in whose district the defendant has his domicile, whether he have his domicile under the jurisdiction of one or of two persons. f. 401.

2. What *forum* a plaintiff ought to sue in, and what things pertain to the secular *forum*.

And although it is generally true that the plaintiff ought to sue in the *forum* of the defendant, it fails however occasionally on account of the diversity of jurisdictions and causes concerning spiritual and temporal matters and their sequels, as in a cause of matrimony and in the premises of a cause of matrimony, which ought to be determined in an ecclesiastical court, because to whose right, that is, to whose jurisdiction the principal matter appertains, to the same person's jurisdiction the accessory matter belongs. And in the same manner as, if in a secular court proceedings are instituted concerning any plea, which pertains to the crown and to the dignity of the king, and faith has been pledged in the contract, the cognisance of the principal matter will not on that account belong to the ecclesiastical *forum*.

3. By reason of the crime and by reason of the contract.

Likewise it fails in testamentary causes and several other causes ecclesiastical. Likewise with regard to a crime, a person is convened where he has committed the offence, as if a person has committed a crime in an-

f. 154 b. Fleta, vi. c. 37.

poterit de *utfangthef* per exēplum. Item ratione cōtractus, quia cōveniendus ubi cōtraxit ille qui cōtraxit. Item ratione rei petitę, ut si clericus petat versus clericum vel laicum debitum q̄ non sit de testamento vel de matrimonio, sequi debet forum laicale, et eodem modo si petat laicum feodum, sub domino feodi erit actio, sicut petitio hæreditatis per breve de recto erit tractanda coram domino feodi, vel coram vicecom̄ si dominus negligens fuerit, quia ratione negligentiæ p̄prii judicis, videlicet domini, transfertur loquela ad comitatū, et sic corā rege & suis justiciariis, multis et variis de causis.

4. Si quis elegerit unum judicem, ad alium recurrere non potest de facili, et debet estimare si sit sui judicis.

Item si quis unum judicem de voluntate sua elegerit, ad alterius audientiam recurrere non debet volūtate propria, cùm talis p̄ consensum effectus sit suus judex, quamvis generaliter verum sit, q̄ sententia à non suo judice lata non teneat, et hoc verū est, nisi hoc faciat regia prohibitio, quia jurisdictionem regis non poterit quis mutare per renuntiationē in præjuditium regiæ dignitatis, secundum quod inferius dicetur: quamvis expediat aliquando actori convenire reum sub judice de cujus factus est jurisdictione per consensum, magis quàm sub eo cui subest domicilii ratione, quia si proprius judex fuerit negligens, alius judex (licet non suus) poterit esse diligentior, dum tamen coertionē habeat q̄ possit judicium suum demandare executioni. Et unde cûm diversæ sint hinc inde jurisdictiones, et diversi judices & diversæ causæ, debet quilibet ipsorum

other person's land, because where he has committed the offence, there he is subject to the law, as may be seen in the case of *utfangthef* for example. Likewise with regard to a contract, because the contractor is to be convened there, where he has made the contract. Likewise with regard to the thing claimed, as if a cleric claims against a cleric or a laic a debt, which is not concerning a testament or concerning a marriage, he ought to sue in the lay *forum*, and in the same manner if he claims a lay feud, the action will be before the lord of the feud, as the claim of an inheritance by a writ of right will have to be treated before the lord of the feud, or before the viscount, if the lord be negligent, because by reason of the negligence of the proper judge, to wit, the lord, the trial is transferred to the county court, and so before the king and his justiciaries, for many and various causes.

4. If a person has elected one judge he cannot easily have recourse to another, and the judge ought to weigh well, whether he is under his jurisdiction.

Likewise if a person has elected a judge of his own choice, he ought not to have recourse to the audience of another of his own will, since the person has been made his proper judge by his own consent, although generally it may be true, that a sentence passed by one, who is not the proper judge, is not binding, and this is true, unless a royal prohibition makes it so, because no one can change the jurisdiction of the king by a renunciation to the prejudice of the regal dignity, according to what will be explained below: although it may be expedient sometimes to the plaintiff to convene the defendant before a judge, under whose jurisdiction he is brought by his own consent, rather than before him, to whom he is subject by reason of his domicile, because if his proper judge be negligent, another judge (although not his own) may be more diligent, provided however that he has coercive power, so that he can enforce execution of his judgment And hence since there are on this side and on that side divers jurisdictions and divers judges and divers causes, each of the said judges ought in the first place to

inprimis estimare an sua sit jurisdictio, ne falcem videatur ponere in messem alienam.

5. Quæ pertinent ad forum ecclesiasticum, et quæ ad forum seculare.

Quia clericus in nullo conveniendus est coram judice seculari, q̃ pertineat ad forum ecclesiasticum, sicut in causis spiritualibus vel spiritualitati annexis, ut si pro peccato vel transgressione fuerit pœnitentia injungenda, et quo casu judex ecclesiasticus habet cognitionem, quia non pertinet ad regem injungere pœnitentias, nec ad judicem secularem, nec etiam ad eos pertinet cognoscere de iis quæ sunt spiritualibus annexa, sicut de decimis et aliis ecclesiæ ꝑventionibus. Item nec de catallis q̃ sunt de testamento vel matrimonio. Itē nec de pecunia ꝑmissa ob causam matrimonii, quæ est quasi sequela matrimonii, ut superius dictū est, et hujusmodi, quia judex ecclesiasticus in iis omnibus habet jus revocādi donū, & quāvis īn omnibus aliis actionibus sive placitis ad forū seculare ꝑtinentibus videatur q̃ clericus sequi debeat forum seculare, et ibi agere et respondere ratione rei vel cōtractus, ubi agitur realiter vel ꝑsonaliter, sicut in actione injuriarum vel criminis, dum tamen civiliter agatur, secundū q̃ videri poterit tota die, q̃ si clericus cōveniendus, quia laicum feodum non habet, sum̄onitionem suscipere noluerit, nec plegios invenire, mandabitur episcopo vel ordinario loci q̃ faciat talē venire coram rege vel justiciariis suis, ad respondendum & satisfaciendū de quocunq̃ placito ad intentionē petētis vel querentis: quamvis sunt qui dicant, q̃ de nullo placito tenentur respōdere, nec rationē rei, contractus vel delicti coram judice seculari, et salva pace eorū, videtur q̃ fit in omnibus actionibus et placitis civilibus & criminalibus, p̃terquàm in executione judicii in causa criminali, ubi laicus[1]

f. 401 b.

[1] "clericus" seems to be here required by the context.

weigh well whether it be under his jurisdiction, that he may not seem to put his reaping hook into another's harvest.

5. What things pertain to the ecclesiastical *forum*, and what to the secular *forum*.

Because a cleric is not to be convened before a secular judge in any matter, which belongs to the ecclesiastical *forum*, as in spiritual causes or causes connected with the spirituality, as if for a sin or a transgression penance is to be enjoined, and in which case the ecclesiastical judge has the cognisance, because it does not belong to the king to enjoin penances, nor to the secular judge, nor does it even belong to them to hold cognisance of those matters which are connected with spiritual things, as concerning tenths and other revenues of the church. f. 401 b. Likewise neither concerning chattels, which are testamentary or matrimonial. Likewise neither concerning money promised by reason of matrimony, which is as it were a sequel of matrimony, as said above, and such like, because the ecclesiastical judge in all these matters has the right to revoke the gift, and although in all other actions and pleas pertaining to the secular *forum* it seems that a cleric ought to sue in the secular *forum*, and there to sue and answer by reason of the thing or the contract, when the proceedings are had against the thing or the person, as in an action of injury or of crime, provided however it is a civil action, according to what may be seen every day, but if a cleric, who is to be convened, because he has not a lay feud is unwilling to accept a summons, or to find sureties, a mandate shall be sent to the bishop or to the ordinary of the place, that he should cause the said person to appear before the king or his justiciaries to answer and to make satisfaction upon any plea to the declaration of the claimant or of the plaintiff: although there be some who say, that they are not bound to answer to any plea, neither by reason of a thing nor of a contract nor of an offence, before a lay judge, and saving all respect for such persons, it seems that it is done so in all actions and civil and criminal suits, except in the execution of a judgment in a criminal cause, where a

condemnandus esset ad amissionem vitæ vel membrorum, et quo casu, quamvis judex secularis habet cognitionem ut cognoscat de crimine, tamen non habet potestatem exequendi judicium sicut in causis civilibus, non enim possit degradare clericum, magis quàm ad ordines promovere, et ideo ꝑpter ejus defectum habet ordinarius executionē judicii, licet aliter observetur ꝙ in causa criminali, ubi pœna capitalis infligenda est, habet ordinarius utramquè, videlicet cognitionem et judicii executionem.

6. Quod laicus non est conveniendus coram judice ecclesiastico de aliquibus, quæ pertinent ad coronam et dignitatem regis.

Vice versa non est laicus conveniendus coram judice ecclesiastico de aliquo, qđ ꝑtineat ad coronā et regiam dignitatem et ad regnum, quod in foro seculari terminari potest et debeat, sicut nec de laico feodo vel eis pertinentiis, ratione supradicta, ut si jura pertineant, sicut advocatio, jus pascendi, eundi, agendi et hujusmodi. Item nec de debitis, nec catallis, nisi sunt de testamento vel matrimonio et hujusmodi, quia rex jus habet revocandi donum propter suum privilegium, quàmvis ipse, qui convenitur coram judice ecclesiastico de placitis, quæ pertinent ad coronam et dignitatē regiam, per se effectus sit per cōsensum de alterius foro et jurisdictione.

7. Quod quis possit renuntiare iis, quæ pro se introductæ sunt, sed non in præjudicium alterius.

Poterit enim quis renuntiare iis, q̃ pro se introducta sunt, sed tamen non in p̃judicium aliorū, sicut in præjudicium regiæ dignitatis, quia injustè non trahitur ad alienum forum, ex quo renūtiando privilegio suo hoc voluit, injustè tamen ꝑpter privilegium ipsius regis. Et unde si quis se obligaverit ꝑ scripturam ad respondendum in foro vetito, non obstante suo privilegio, i. regia ꝑhibitione, seipsum obligat et non regem,

cleric would have to be condemned to the loss of life or of members, and in which case, although the secular judge has cognisance, that he should take cognisance of the crime, nevertheless he has not power to execute his judgment as in civil causes, for he cannot degrade a cleric any more than promote him to orders, and accordingly on account of his defect the ordinary has the execution of the judgment, although it be otherwise observed, that in a criminal cause, where capital punishment is to be inflicted, the ordinary has both, to wit, cognisance and the execution of the judgment.

6. That a laic is not to be convened before an ecclesiastical judge concerning any matters, which pertain to the crown and to the dignity of the king.

Conversely a laic is not to be convened before an ecclesiastical judge concerning any matter, which pertains to the crown or to the regal dignity and to the kingdom, which can be determined in the secular *forum* and ought so to be, as for instance neither concerning a lay fee nor its appurtenances, for the reason above said, as if rights appertain to it, as the right of advowson, the right of pasture, of a pathway, of a bridle-way and such like. Likewise neither concerning debts nor chattels, unless they are concerning a testament or matrimony or such like, because the king has the right of revoking a gift on account of his own privilege, although he who is convened before an ecclesiastical judge concerning pleas, which pertain to the crown and to the regal dignity, may be made through himself by his own consent subject to the *forum* and jurisdiction of the other one.

7. That a person may renounce those things, which have been introduced on his own behalf, but not to the prejudice of another.

For a person may renounce those things which have been introduced on his own behalf, but not however to the prejudice of others, for instance to the prejudice of the regal dignity, for a person is not drawn unjustly to a foreign *forum*, inasmuch as by renouncing his privilege he has been willing, unjustly however on account of the privilege of the king himself. And hence if any one has bound himself by a writing to answer in a forbidden *forum*, notwithstanding his own privilege, that is, the

et unde si ille idem postmodum ꝑhibitionẽm impetraverit quòd judices nō ꝓcedant, et cōtra factū suū multipliciter delinquit, delinquit enim ꝑ hoc ꝙ placita quæ pertinent ad coronam et dignitatem regis trahit ad alienum forū. Delinquit enim ex hoc quôd venit contra factum suum proprium, et unde cùm judices et partes comparuerint, judices puniuntur, eo quòd post prohibitionem contra prohibitionem processerunt,
f. 402. et si convincantur, gaolæ committantur, et pœna pecuniaria graviter puniantur, et ille eodem modo de quo queritur qui hoc ꝓcuravit, sed non propter querelam querentis et injuriam ei factam, sed propter injuriam factam ipsi regi, non est enim ei aliqua injuria facta propter consensum, quia trahi voluit ad alienum forum, & quia sic voluit, puniatur ut primi, & quia venit contra factum suum, et ꝑ impetrationẽ suam jam rediit ad forū debitum, ut ibi respondeat de placito principali, etiam sine alio brevi, et judices et ille de quo queritur quantū ad placitum ꝑhibitionis recedant versus eum sine die, et ipse in misericordia versus eos pro falso clameo.

Cap. III.

1. De prohibitionibus domini regis. Item dictum est si per consensum,

Dictum est qualiter per consensum fit de alterius jurisdictione: nunc autem dicendum, si contra voluntatem trahatur in placitum coram judice ecclesiastico de placitis, quæ pertinent ad cor̃am et dignitatem regis, unde cûm quis ita tractus fuerit coram judice ecclesiastico contra voluntatem suam, qui estimare

royal prohibition, he binds himself and not the king, and hence if the very same person has afterwards sued out a prohibition, that the judges should not proceed, he offends in many ways against his own act, for he offends in this respect that he drags to another *forum* pleas, which belong to the crown and to the dignity of the king. He offends also in this respect that he goes against his own act, and hence when the judges and the parties have appeared, the judges are punished, inasmuch as after a prohibition they have acted against the prohibition, and if f. 402. they are convicted, let them be committed to gaol, and let them be heavily punished with a pecuniary penalty, and the party in the same manner, concerning whom complaint is made, that he has procured this, but not on account of the complaint of the complainant and of the wrong done to him, but on account of the wrong done to the king himself, for to the former no wrong has been done by reason of his consent, because he was willing to be brought before another *forum*, and because he was so willing let him be punished as the first, and because he has gone against his own act, and through his own request has now returned to his due *forum*, that he may there answer concerning the principal plea even without another writ, and let the judges and the party of whom he complains, as far as concerns the plea of prohibition, withdraw as regards him without a day, and let him be amerced as regards them for his false claim.

Chapter III.

We have discussed in what manner a person by consent becomes under another's jurisdiction. Now we must discuss if contrary to one's will one is drawn into a suit before an ecclesiastical judge concerning pleas, which pertain to the crown and the dignity of the king, whence, when a person has been so drawn before an ecclesiastical judge against his will, who has been un-

1. Concerning the prohibitions of the lord the king. Likewise "if by consent" has been

nunc autem si contra voluntatem.

noluerit an sua sit jurisdictio, sed jurisdictionem regis sibi usurpaverit, & delinquunt tam judices qui placitum tenent quâm ille qui sequitur, ad querelam illius qui sic ad non suum judicem trahitur, fiat breve domini regis judicibus ne procedant, & ei qui sequitur ne sequatur, in hac forma. Et si judicassent, judicium exequi non possent, quia vicecom̃ nihil faceret ad mandatum ipsorum.

2. Breve ad prohibendum, si contra coronam et dignitatem domini regis, judicibus ne teneant placitum de catallis quæ non sunt de testamento vel matrimonio.

Rex talibus judicibus salutem. Prohibemus vobis, ne placitum teneatis in curia Christianitatis inter A. petentem & B. tenentem de tanta terra cum pertinentiis, vel de laico feodo ipsius B. in tali villa, vel aliter: de catallis vel debitis quæ non sunt ex testamento vel matrimonio, & unde p̃dictus B. queritur quòd prædictus A. eum injuste trahit in placitū coram vobis, quia placita de laico feodo & de debitis & catallis q̃ non sunt de testamēto & matrimonio spectant ad coronam & dignitatē nostrā. Et hujusmodi p̃hibitio locū habet, cùm scribitur judicibus qui ordinariā habēt jurisdictionē. Si autē delegatam, ut si delegati fuerunt à dño papa, vel alio ordinario tunc sic.

3. Breve judicibus ne teneant de laico feodo. Glanville, l. xii. cap. 23.

Rex talibus judicibus salutē. Prohibem⁹ vobis, ne teneatis placitū in curia Christianitatis de laico feodo A. in tali villa, & unde idē A. q̃ritur q̃ B. de N. trahit eum in placitū corā vobis in curia Christianitatis autoritate literarū dñi papæ de laico feodo suo vel debitis et catallis &c. ut supra. Et idē dici poterit de advocationibus ecclesiarū vel de aliis placitis q̃ pertinent ad coronam et dignitatem domini regis, & tunc sic: ne teneatis placitum in curia Christianitatis de advocatiōe ecclesiæ de tali loco, unde talis q̃ritur

willing to weigh whether the jurisdiction was his own, but has usurped to himself the jurisdiction of the king, both the judges who entertain the plea as well as he who sues offend, then upon the plaint of him who is drawn before a judge who is not his own, let a writ of the lord the king be issued to the judges that they should not proceed, and to him who sues that he should not sue, in this form. And if they have judged, they should not be able to execute their judgment, because the viscount would do nothing upon their mandate.

discussed, now indeed we must discuss "if against one's will."

2. A writ to prohibit, if against the crown and the dignity of the king, to the judges that they should not entertain a suit concerning chattels, which are not testamentary nor matrimonial.

The king to certain judges greeting. We prohibit you, that you should not entertain a suit in the court of Christianity between A. the claimant and B. the tenant concerning so much land with its appurtenances, or concerning the lay feud of the said B. in such a vill; or otherwise, concerning the chattels or debts which are not testamentary nor matrimonial, and whereof the aforesaid B. complains, that the aforesaid A. draws him unjustly into a suit before you, because pleas concerning a lay feud and concerning debts and chattels, which are not testamentary nor matrimonial, belong to our crown and our dignity. And this kind of prohibition has place when the writ is sent to judges who have ordinary jurisdiction. But if they have delegated jurisdiction, as if they have been delegated by the lord the pope, or by some other ordinary, then in this form.

3. A writ to the judges not to entertain a suit concerning a lay fee.

The king to such and such judges greeting. We prohibit you, that you should not entertain a suit in the court of Christianity by authority of letters from the lord the pope concerning a lay feud, or concerning debts and chattels as above said. And the same may be said concerning the patronage of churches or concerning other pleas which pertain to the crown and to the dignity of the lord the king, and then thus: that you should not entertain a plea in the court of Christianity concerning the patronage of a church in such a place, whereof so-

f. 402 b. &c. ut supra, quia placita de advocationibus ecclesiarum spectant ad coronā et dignitatē nr̃m. T. &c. Et sic fiet de omni jure q̄ pertinere potest ad laicū feodum, de quo rex habere debet cognitionem. Et eodē modo scribatur parti adverse, ne sequatur in hac forma.

4. Breve parti, ne sequatur. Glanville, l. xii. cap. 23.

Rex tali salutē. Prohibemus tibi, ne sequaris placitū in curia Christianitatis de laico feodo tali in villa vel de debitis, catallis vel advocatione ecclesiæ et hujusmodi, et unde p̃dict⁹ talis queritur q̄ tu trahis eum in placitū in curiam Christianitatis corā tali judice, ordinario videlicet, vel corā talib⁹ judicibus, videlicet delegatis autoritate literarum dñi papæ, vel autoritate literarū alicujus alterius ordinarii, vel autoritate literarū alterius subdelegati à judicib⁹ à dño papa delegatis, quia hujusmodi placita &c. ut supra, & ita q̄ hujusmodi brevia semper conveniant brevibus ad judices transmissis.

Cap. IV.

1. De prohibitionibus et advocationibus ecclesiæ.

Sunt etiam alia genera p̄hibitionū q̄m plura & diversa, quarū q̃dam sunt de advocationibus ecclesiarū, ubi nō agitur directè inter patronos ut hic, sed indirecte : ut si inter rectores, qui tenēt ecclesias de advocatione et donatione diversorum patronorū, inter se cōtendant de decimis, oblationibus, & obventionibus ecclesiarum, et ita quod si petens obtineret, posset patronus jacturā suæ advocationis incurrere, fit judicibus ne p̄cedant p̄hibitio in hac forma, si de tota advocatione fiat cōtentio.

and-so complains &c. as above, because pleas concerning the patronage of churches belong to our crown and dignity. Witness &c. And so it shall be done concerning every right, which may pertain to a lay feud, concerning which the king ought to have cognisance. And in the same way let a writ go to the adverse party, that he should not sue. f. 402 b.

4. A writ to the party not to sue.

The king to so-and-so greeting. We prohibit you, that you should not prosecute a suit in the court of Christianity concerning a lay feud in such a vill, or concerning debts, or chattels, or the patronage of a church, and such like, and whereof the aforesaid so-and-so complains that you are drawing him into a suit into the court of Christianity before such a judge, the ordinary, to wit, or before such judges, delegated, to wit, by the authority of letters from the lord the pope, or by the authority of letters from some other ordinary, or by the authority of letters from some other sub-delegate of certain judges delegated by the lord the pope, because pleas of this kind &c. as above, and so that writs of this kind should always agree with the writs transmitted to the judges.

Chapter IV.

1. Concerning prohibitions and the patronage of churches.

There are also other kinds of prohibitions both numerous and various, of which some are concerning the patronage of churches, where proceedings are not had directly between the patrons as here, but indirectly: as if rectors who hold churches of the patronage and donation of different patrons dispute with one another concerning the tithes, oblations, and obventions of the churches, and so that, if the plaintiff prevails, the patron might incur the loss of his advowson, a prohibition is issued to the judges, that they should not proceed, after this form, if the contention is about the entire advowson.

2. Prohibitio de advocationibus, Indicavit judicibus.

Rex talibus judicibus salutem. Indicavit nobis A. q̃ cùm B. talis clericus vz. tenet ecclesiā de tali loco de advocatione sua, C. talis clericus vz. clamans eā de advocatione D. trahi[1] eū in placitū corā vòbis in curia Christianitatis autoritate literarū dñi papæ. Quia vero manifestū est q̃ p̃fatus A. jacturā advocationis suæ incurreret, si p̃dictus C. in causa illa optineret, vobis p̃hibemus ne in causa illa p̃cedatis, donec discussum fuerit in curia nostra ad quē illorū, s. A. vel D., p̃tineat ejusdem ecclesiæ advocatio, quia placitū de advocatione &c. ut supra. Teste &c. Est & alia p̃hibitio de eodē, ubi agitur indirectè de parte sicut de toto, ut si agāt rectores de medietate alicuj[9] ecclesiæ vel de tertia parte inter se de ecclesia q̃ divisa fuit ab antiquo inter patronos & de advocatione ratiōe diversorū feodorū, & tūc fiat p̃hibitio in forma supradicta. Si autem cōtentio fuerit inter rectores de aliquib[9] decimis q̃ estimari possunt usq̃ ad quartam, quintam, vel sextam partē advocationis, et ultra quam partē non extēditur p̃hibitio ut videtur, tunc fiat judicibus p̃hibitio in hac forma.

f. 403.

3. Prohibitio, si rectores ecclesiarum contendant inter se sine patronis.

Rex talibus judicibus salutē. Indicavit nobis A. q̃ cùm B. teneat de advocatione sua sextam p̃tem ecclesiæ de N. talis abbas clamās p̃dictam sextam p̃tem de advocatione B. trahit eum in placitum coram vobis in curia Christianitatis, quia vero manifestū est quòd p̃dictus A. jacturam advocationis p̃dictæ sextæ partis illius ecclesiæ incurreret, si prædictus abbas in causa illa obtineret, vobis p̃hibemus ne in causa illa procedatis, donec discussum fuerit ad quem illorum pertineat prædictæ sextæ partis advocatio, quia placitum &c.

[1] "trahit," MSS. Rawl. C. 160 and 159.

2. A prohibition concerning advowsons. "Indicavit" to the judges.

The king to so-and-so judges greeting. A. has indicated to us that when B. such a cleric, to wit, holds the church of such a place upon his presentation, C. such a cleric, to wit, claiming it upon the presentation of D., draws him into a plea before you in the court of Christianity by authority of letters from the lord the pope. Since however it is manifest that the aforesaid A. would incur the loss of his advowson, if the aforesaid C. should prevail in that suit, we prohibit you that you may not proceed in that cause, until it has been settled in our court, to which of them, to wit, A. or D., the advowson of that church pertains, because a plea concerning an advowson, &c. as above. Witness, &c. There is also another prohibition concerning the same thing, where proceedings are had indirectly concerning a part just as concerning the whole, as if the rectors of the mediety of a certain church, or of the third part, proceed against one another concerning a church which has been divided from olden time between the patrons, and concerning the advowson by reason of divers feuds, and then let a prohibition issue in the form abovesaid. But if there be a contention between the rectors concerning certain tithes, which may be valued up to a fourth, or a fifth, or a sixth part of the advowson, and beyond which part the prohibition is not extended, as it seems, then let there issue to the judges a prohibition after this form.

f. 403.

3. A prohibition, if the rectors of churches contend with one another without the patrons.

The king to such and such judges greeting. A. has indicated to us that when B. holds of his patronage the sixth part of the church of N., abbot so-and-so claiming the aforesaid sixth part as of the patronage of B. draws him into a suit before you in the court of Christianity, but because it is manifest that the aforesaid A. would incur the loss of the patronage of the sixth part of that church, if the aforesaid abbot were to prevail in that suit, we prohibit you that you should not proceed in that cause, until it has been settled to which of them the patronage of the aforesaid sixth part belongs, be-

ut supra. Et fiat clerico ꝑhibitio qui sequitur in forma q̃ consona sit ꝑhibitioni factæ judicibus. Poterit aliquando sine præjudicio alicujus de cōsensu patronorum, ad breve quod dicitur Indicavit, si contingat quòd decimæ petantur in foro ecclesiastico quæ sunt de alterius advocatione sive in toto sive pro parte majore, fieri inquisitio in curia dñi regis tanquam de advocatione ꝑpter estimationem decimarum, ubi ecclesia enormiter læsa est, ut ꝑ ecclesia recenter spoliata fuerit in hac forma: utrū vz. talis præsentatus à tali patrono recenter fuerit in seysina de talibus decimis tanquam spectantibus ad ecclesiā suam, qm tenet de ꝑsentatione talis patroni sui, vel si talis alia ꝑsona inde fuit in seysina tali tēpore ut de decimis spectantibus ad ecclesiam suam talē, qm tenet de advocatione talis patroni sui.

4. Prohibitio, si clericus, præsentatus ab eo qui obtinuerit, implacitatus fuerit a clerico ipsius qui amisit in curia regis.

Est & aliud genus ꝑhibitionis, ut cùm inter patronos cōtentio fuerit aliquādo de jure ꝑsentationis & quilibet eorū clericū suū ꝑsentaverit et pendente ꝑsentatione unus obtinuerit, ad cujus ꝑsentationē clericus admissus fuerit, si clericus qui ab aliquo alio patrono ꝑsentatus fuerit clericū ita admissū corā judicib⁹ ecclesiasticis implacitaverit ratione ꝑsentationis ejus qui amisit, fiat eis ꝑhibitio talis in hac forma.

5. Breve prohibitionis (Ostendit nobis) formatum a justiciariis secundum querelam.

Rex tali priori & cōjudicibus suis salutē. Ostēdit nobis A. q̃ cùm ipse ad ecclesiā talē vacantem aliquādo ꝑsentasset B., C. gerēs se patronū illius ecclesiæ ad eādē ecclesiā ꝑsentavit clericū suū, s. D., & cū idē A. seysinā ꝑsentandi in curia nr̃a &c. recuperasset versus ipsū C., et B. clericus ad ꝑsentationē suam ad

cause a suit, &c. as above. And let there be issued a prohibition to the cleric who sues in a form, which is consonant to the prohibition issued to the judges. Sometimes also without prejudice to any one with the consent of the patrons upon the writ which is called "Indicavit," if it happens that tithes are claimed in the ecclesiastical court, which belong to the advowson of another person, either in their entirety or for the greater part, an inquest may be held in the court of the lord the king, as if concerning the advowson, respecting the estimate of the tithes, where the church has been enormously wounded, as for instance if the church has been recently spoiled, in this form: whether so-and-so presented by such a patron was recently in seysine of such tithes as belonging to his church, or if such other person was in seysine thereof at such a time, as of tithes belonging to his church, which he holds of the presentation of so-and-so his patron.

4. A prohibition, if the clerk presented by him, who has prevailed, shall have been impleaded by the clerk of him, who has lost in the court of the king.

There is also another kind of prohibition, as when there has been a dispute betweens patrons at a certain time concerning the right of presentation, and a certain one of them has presented his clerk and pending the presentation one of them has prevailed, upon whose presentation a clerk has been admitted, if a clerk who has been presented by some one else as patron shall have impleaded before ecclesiastical judges the clerk who has been so admitted, let a prohibition issue to them in this form.

5. A writ of prohibition (Ostendit nobis) drawn up by the justiciaries in accordance with the complaint.

The king to the prior of so-and-so and his associate judges greeting. A. has shown to us that when he had presented B. to his church of so-and-so which was vacant, C. pretending to be the patron of such church had presented to that church his clerk, to wit, D., and when the said A. had recovered the seysine of the presentation in our court &c. against the said C., and B. his clerk upon his presentation had been so admitted under

mandatum nostrū sic admiss⁹, idē D. trahit eū in placitū in curia Christianitatis corā vobis ratione p̃sentationis de se factæ, autoritate literarū dñi papæ, & quia ea q̃ in curia nr̃a ritè acta sunt irritari non debēt, vobis p̨hibemus, ne in causa illa p̨cedatis ad irritanda ea q̃ in curia nr̃a rite acta sunt. Teste &c. Itē alia forma de eodē & quasi p̨ breve de Indicavit.

6. Breve prohibitionis contra eum, qui sequitur contra judicium factum in curia domini regis.

Rex tali priori et cōjudicibus suis salutē. Ostēdit nobis A. prior de N. q̨ cùm nup in curia nr̃a corā justic. nr̃is &c. recuperasset versus B. priorē de tali loco advocationē capellæ de N. ut p̨tinētē ad matricē ecclesiā ipsius A. prioris p̨ recognitionē magnæ assisæ inde ibi inter eosdē priores captā, & idē A. prior de tali loco teneat eandē capellā in p̨prios usus p̨ ordinariū loci, cui p̨ cōsiderationē curiæ nr̃æ mandavimus p̨cessum illius loquelæ, ut q̨ suū esset inde exequeretur, C. s. clericus de N. trahit ipsū A. priorē de tali loco in placitū coram vobis, petens capellam illam ut p̨sona ejusdem ex advocatione & donatione prædicti B. prioris de tali loco, qui advocationē illam in curia nr̃a amisit p̨ recognitionē magnæ assisæ, & tanq̨m inde
f. 403 b. spoliatus desicut nūq̨m fuit in eadē institutus, ut p̃dictus A. prior de tali loco dicit. Et quia p̃dictus B. prior de tali loco (de cujus advocatione dictus C. petit capellā illā) nihil juris habet in illa sicut recognitū est p̨ assisam, & ea quæ in curia nostra rite acta sunt nō debeant in foro ecclesiastico ab aliquo infirmari, vobis mandamus, quòd si ad mandatū dicti ordinarii vobis constiterit, q̨ p̃dictus C. clericus nunq̨m fuit in eadē capella institutus tēpore, quo p̃dictus

our mandate, the said D. draws him into a plea in the court of Christianity before you by reason of a presentation made of himself by the authority of letters from the lord the pope, and because such matters as have been duly transacted in our court ought not to be set aside, we prohibit you, that you should not proceed to set aside those matters which have been duly transacted in our court. Witness &c. Likewise in another form concerning the same, and as it were by a writ of "Indicavit."

6. A writ of prohibition against him, who sues against a judgment made in the court of the lord the king.

The king to such a prior and his associate judges greeting. A. the prior of N. has shown to us that when he has lately recovered in our court before our justiciaries against B. the prior of such a place the advowson of the chapel of N. as belonging to the mother church of the said prior A. through the recognition of a great assize held thereon between the said priors, and the said A. the prior of such a place holds the said chapel for his proper uses through the ordinary of the place, to whom by a resolution of our court we have sent the process of that trial, in order that he might perform whatever was his proper duty, C., to wit, the clerk of N., draws the said A. the prior of such a place into a suit before you, claiming the said chapel, as parson of the same, under the presentation and donation of the aforesaid B. the prior of such a place, who lost the advowson of it by the recognition of a great assise, and as if spoiled of it was consequently never instituted to the same, as the aforesaid A. the prior of such a place says. And because the aforesaid B. the prior of such a place (upon whose presentation the aforesaid C. claims that chapel) has no right to it, as was recognised by the assise, and those matters which have been duly transacted in our court ought not to be impeached by any one in an ecclesiastical court, we command you that, if it be ascertained by you, that the aforesaid clerk C. was never instituted to the said chapel at the mandate of the said ordinary at the time, at which the aforesaid A. the prior of such a f. 403 b.

A. prĩor de tali loco nec ante recuperavit in curia nr̃a prædictam advocationē, vobis p̃hibemus, quod in causa illa q̃ est corā vobis (ut dicitur) non p̃cedatis, quia hoc esset manifeste contra coronam & dignitatē nr̃am. Teste &c. Itē q ea quæ in curia domini regis rite acta sunt irritari non debent; & ubi consensum est in aliq̃m clericum eo q hæres alicujus fuerit infra ætatē, si clerici primo p̃sentati velint institutum implacitare, tunc fiat p̃hibitio in hac forma.

7. Prohibitio, si fiat contra ea, quæ in curia domini regis rite acta sunt.

Rex talibus judicibus salutē. Prohibemus vobis, ne teneatis placitū in curia Christianitatis de ecclesia de N. de cujus advocatione nuper placitum fuit in curia nostra coram justic. &c. inter A. querentem & B. custodē C. filii & hæredis A. impediētem ratione juris q idem B. dicebat eundē C. habere in p̃dicta advocatione, & unde inter eosdē A. & B. convenit in curia nr̃a coram justic. nostris, q uterq̃ illorum cōsensit in E. cancellariū talē eo q judiciū p̃cedere non potuit, quia p̃dictus C. (de quo dicitur q jus habet in p̃dicta advocatione) ad chartas antecessoris sui vel hujusmodi respondere nō potest cùm sit infra ætatē. Et quia si placitum q est coram vobis in curia Christianitatis p̃cederet, idē C. dum infra ætatē fuerit jacturam advocationis suæ posset incurrere, et placita de advocationibus ecclesiarum pertinent ad coronam & dignitatē nostram &c. Teste &c. Est ad aliud genus prohibitionis ratione rerum temporalium quæ ad ipsum regem pertinere possunt ratione custodiæ archiepiscopatuum & episcopatuum vacantium, & quæ occasionem inducunt prohibendi sicut pro sancto Edmundo archiepiscopo Cantuar̃, & fit prohibitio in hac forma.

place, and not before, recovered in our court the said advowson, we prohibit you, that you should not proceed in that cause which is before you (as is said), for this would be manifestly against our crown and dignity. Witness &c. Likewise because those things which have been duly transacted in the court of the lord the king ought not to be made void, and where a certain clerk has been agreed upon, inasmuch as the heir of some one is under age, if the clerks first presented wish to sue the person instituted, then let a prohibition issue in this form.

7. A prohibition, if any thing is done contrary to those things, which have been duly transacted in the court of the lord the king.

The king to such and such judges greeting. We prohibit you, that you should not hold a plea in the court of Christianity concerning the church of N., concerning the advowson of which there has been lately a suit in our court before our justiciaries &c., between A. the plaintiff and B. the guardian of C. the son and heir of A., impeding him by reason of the right which the said B. alleged that the said C. has in the said advowson, and whereupon it has been agreed between the said A. and B. in our court before our justiciaries, that both of them have agreed upon E. the chancellor of such a place, inasmuch as the judgment could not proceed, because the aforesaid C. (concerning whom it is said that he has the right to that advowson) cannot answer, since he is under age, as to the charters of his ancestors and such like. And because if the suit, which is before you in the court of Christianity, were to proceed, the said C. since he is under age might incur the loss of his advowson, and pleas concerning the advowsons of churches pertain to our crown and dignity &c. Witness &c. There is also another kind of prohibition by reason of temporal things, which may pertain to the crown by reason of the custody of vacant archbishoprics and bishoprics, and which bring on an occasion of prohibiting, as on behalf of Saint Edmund archbishop of Canterbury, and a prohibition issues in this form.

8. Si de iis, quæ pertinent ad laicum feodum ratione alicujus advocationis, sicut de exenniis et redditibus, quæ pertinere possunt ad coronam.

Rex priori & convẽtui Roff. salutẽ. Ex relatione quorundã nuper didicimus q cùm venerabilis pater E. Cantuaŕ archiepiscopus habeat custodiã episcopatus Roff. nunc vacantis cum omnibus exitibus & p̃ficuis ad dictum episcopatum spectantibus, vos trahitis in placitum in curia Christianitatis eundẽ archiepiscopum autoritate literarum domini papæ super quibusdã exenniis[1] quæ præstanda sunt de maneriis nostris, et eodem modo consuetudo[2] quo alii annui redditus reddi solent episcopo si viveret, eo q̃ idem archiepiscopus ea sibi reddi postulat ratione custodiæ ejusdem episcopatus tempore vacationis. Et quoniam si vos in causa illa obtineretis, manifestum esset nobis inde damnũ incurrere, si contingeret aliquãdo archiepiscopũ Cantuaŕ simul cũ episcopatu Roff. vacare & utrũq̃ in manu nr̃a existere, vobis p̃hibemus ne placitum illud sequamini in curia Christianitatis, quia hoc esset contra coronã et dignitatem nostram & ad damnum nostrum & p̃judicium libertatis nostræ, quam habemus de episcopatibus vacantibus in regno nostro. Teste &c. Et fiat aliud breve in eadem forma judicibus, ne procedant.

f. 404. Est & aliud genus prohibitionis, ubi quis clericus p̃sentatus ad ecclesiam p̃ dominũ regem p̃pter insufficientiã recusatus fuerit & alius idoneus institutus, si velit inquietare institutum, & tunc fiat p̃hibitio in hac forma.

9. Si minus idoneus fuerit recusatus et idoneus admissus, ad querelam breve

Rex talibus judicibus salutem. Satis meminimus nos jam pridem p̃sentasse venerabili patri E. Cantuaŕ archiepiscopo A. de N. ad ecclesiam talẽ tunc vacantem, quem quidem cùm idem archiepiscopus minus idoneum invenisset, ipsum ad eandem admittere recusavit, et cùm idem archiepiscopus à nobis licentiam obtineret

[1] " exhenniis," MS. Rawl. C. 160. | [2] " consueto," MS. id.

8. If concerning those things which pertain to a lay feud by reason of a certain advowson, as concerning certain payments and rents which may pertain to the crown.

The king to the prior and convent of Rochester. Upon the report of certain persons we have lately learnt that, whilst the venerable father Edmund, archbishop of Canterbury, has the custody of the bishopric of Rochester, which is now vacant, with all the issues and profits belonging to the said bishopric, you draw into a suit in the court of Christianity the said archbishop by the authority of letters from the lord the pope concerning certain payments which are to be made from our manors, and in the same accustomed manner in which other annual rents are usually rendered to the bishop, if he were alive, inasmuch as the said archbishop claims the same to be rendered to him by reason of his custody of the said bishopric during the time of the vacancy. And since if you were to prevail in that suit it is manifest that we should incur loss, if it should happen at any time, that the archbishopric of Canterbury together with the bishopric of Rochester should be vacant, and both should be in our hand, we prohibit you, that you should not prosecute that suit in the court of Christianity, because that would be against our crown and dignity and to our loss and to the prejudice of our franchise, which we have concerning vacant bishoprics in our kingdom. Witness &c. And let there issue another writ in the same form to the judges, that they should not proceed. There is also another kind of prohibition, where a certain clerk presented to a church by the lord the king has been rejected for insufficiency, and another fit person has been instituted, if he seeks to disturb the person instituted, let a prohibition issue in this form. f. 404.

9. If an insufficient person has been rejected and a fit person admitted, upon his complaint a

The king to so-and-so judges greeting. We well remember that we have some time ago presented to the venerable father Edmund, archbishop of Canterbury, a certain A. de N. to such a church then vacant, whom indeed when the said archbishop found him to be insufficient, he refused to admit him to the said church, and when the said archbishop had obtained from us a

formatum a justiciariis.

de idonea ꝑsona eidē ecclesia ꝓvidenda, illam B. de N. viro ꝓvido & honesto & laudabilis conversationis contulit, cujus collationi et ordinationi de eadem factæ regium adhibuimus assensum & favorē. Et cùm idē A. jam pristinæ ꝑsentationi ad dictam ecclesiam de persona sua per nos factæ adhæreat, & de qua nihil consequi potuit ꝓpter suam insufficientiam, trahit ipsum B. in placitum de eadem ecclesia coram vobis autoritate literarum dñi papæ, et quoniam injustum est & contra dignitatem nostram q̄ idē A., cui fuit ꝓpter suam insufficientiam institutio denegata, ipsum B. implacitet et inquietet, qui per ipsum archiepiscopum sicut persona idonea ad eandem admissus & canonicè institutus nostro interveniente assensu & favore, vobis ꝓhibemus, q̄ de cætero placitum illud non teneatis. Teste &c. Et fiat br̃e in consimili forma clerico ne ꝓcedat. Est et aliud genus prohibitionis, cùm ipse rex vel aliquis antecessor suus, ratione alicujus vacationis alicujus episcopatus, abbatiæ, vel prioratus, & in manu sua existentis, ꝑsentaverit clericum, & qui ad præsentationem suam fuerit institutus: & episcopus, vel abbaṣ, vel prior substitutus veniat cōtra ꝑsentationem regis vel patris sui, tunc fiat ꝓhibitio in hac forma.

10. Prohibitio judicibus, si clericus ad præsentationem regis vel antecessoris admissus implacitetur in curia Christianitatis.

Rex talibus judicibus salutem. Monstravit nobis A. de N. q̄ cum teneat advocationem talis ecclesiæ de donatione J. regis patris nostri, quam ei contulit ratione talis prioratus vacantis & in manu sua existentis, prior illius loci jam infirmare nititur institutionem illius A. de ꝑdicta ecclesia, quam sic ad ꝑsentationem dicti patris nostri canonice est adeptus, & gravans, & inquietans eum multipliciter, trahit eum coram vobis in curiam Christianitatis, autoritate literarum dñi papæ de eadē ecclesia. Et quoniam hoc est manifestè in opprobrium et ꝓjudicium regiæ dignitatis,

license to provide a fit person for the said church, he collated to it B. de N., a man prudent and honest and of laudable conversation, to whose collation and ordination to the said church we have given our royal assent and favour. And since the said A. adheres to the former presentation made by us of his person to the said church, and from which he could derive no effect on account of his insufficiency, he draws the said B. into a suit concerning the said church before you by authority of letters from the lord the pope, and since it is unjust and contrary to our dignity that the said A., to whom institution was denied on account of his insufficiency, should implead and disquiet the said B. who has been admitted as a fit person to the said church and canonically instituted, our assent and favour intervening, we prohibit you, that henceforth you should not entertain that suit. Witness, &c. And let a writ issue in similar form to the clerk, that he should not proceed. There is also another kind of prohibition, when the king himself or some one of his ancestors by reason of a vacancy of a bishopric, abbey or priory, which is in his hand, has presented a clerk, who on his presentation has been instituted: and a bishop or abbot or prior substituted comes against the presentation of the king or his father, then let a prohibition issue in this form.

writ drawn up by the justiciaries.

The king to so-and-so judges greeting. A. de N. has shown to us, that when he holds the advowson of such a church upon the donation of John our father, which he conferred on him by reason of such a priory being vacant and being in his hand, the prior of that place now strives to invalidate the institution of the said A. to the aforesaid church, which he has canonically obtained upon the presentation of our said father, and grieving and disquieting him in many ways, draws him before you into the court of Christianity, by the authority of letters from the lord the pope concerning the said church. And as it would be manifestly to the disgrace and pre-

10. A prohibition to the judges, if a clerk admitted on the presentation of the king or of his ancestor should be impleaded in the court of Christianity.

si p̃dictus prior in causa illa obtineat: vobis p̱hibemus, ne in causa illa p̱cedatis, cùm vobis & universis de regno nr̃o notorium sit & esse debet, q̱ ecclesię vacantes & p̱tinentes ad collationem episcoporum, abbatum, & priorum sede non vacante dum viverent, p̱tinere debent ad nos, ratione custodię tempore vacationis. Teste &c. Et q̱ dictū est de episcopatibus, abbatiis, prioratibus, dici poterit de baroniis & aliis, dum fuerint in custodia dñi regis.

f. 404 b.

Cap. V

1. Prohibitio[1] si clericus implacitaverit ballivum vel alium ministrum, eo quod arrestavit eum pro pace regis vel pro latrocinio.

Est etiã inter alias p̱hibitiones q̃dam p̱hibitio, ubi videlicet clericus implacitaverit ballivū dñi regis in curia Christianitatis aliqua de causa, eo forte quòd idē ballivus eũ arrestavit p̱ aliqua transgressione, & p̱ pace dñi regis, & de quo petita fuit curia Christianitatis p̱ episcopum: & forma p̱hibitionis talis est. Rex talibus judicibus salutē. Mōstravit nobis talis vic., major, p̃positus talis villæ, vel ballivus quilibet, q̱ cùm A. clericū tanqm malefactorē & rettatū de roberia & societate latronū, vel inventum tali loco in convētu & societate latronū, & certa suspicione notatum, p̱ officii sui debito, & p̱ pace nr̃a p̱ legem terræ secundū regni nostri consuetudinē nuper arrestari fecisset, quoniã etiam postmodũ tali episcopo, qui ipsum petiit sibi liberari tanqm clericū à carcere & custodia nr̃a, fecimus liberari. Idem A. clericus p̃fatum ballivū nostrū, occasione p̃dicta trahit in placitū coram vobis autoritate

[1] A rubric, which precedes here in Tottell's edition, and has no bearing on the subject matter of this chapter, has been designedly omitted. It has the appearance of a side note and has reference to the subject matter of the preceding chapter: "De donationibus quæ pertinent "ad regem in vacationibus episco-"patuum, abbatiarum, prioratuum "et hujusmodi."

judice of our royal dignity, if the aforesaid prior should prevail in that cause, we prohibit you, that you should not proceed in that cause, since it is and ought to be notorious to you and to every person of our realm, that vacant churches which pertain to the collation of bishops, abbots, and priors, whilst their see is not vacant during their lifetime, ought to belong to us by reason of our guardianship in the time of a vacancy. Witness, &c. And what is said of bishoprics, abbeys, priories, may be said of baronies and other offices, whilst they are in the custody of the lord the king.

Chapter V.

f. 404 b.

1. A prohibition if a clerk has impleaded a bailiff or other officer on the ground, that he has arrested him on behalf of the king's peace or for robbery.

There is likewise amongst other prohibitions a certain prohibition, to wit, where a clerk has sued a bailiff of the lord the king in the court of Christianity for a certain cause on the ground that the said bailiff has arrested him for some transgression, and for the peace of the lord the king, and concerning whom the court of Christianity was applied to by the bishop. The form of the prohibition is of this kind:

The king to judges so-and-so greeting. So-and-so our viscount, or mayor, or provost of such a vill, or bailiff of such a place, has shown to us that when he had lately caused to be arrested a clerk A. as a malefactor and accused of robbery and of associating with robbers, or found in such a place in a meeting and society of robbers, and marked with a certain suspicion, according to the duty of his office and on behalf of our peace by the law of the land according to the custom of our realm, since likewise we have afterwards caused him to be delivered up to bishop so-and-so, who claimed him to be delivered up to him, as being a clerk, from our prison and our custody. The said clerk A. draws our aforesaid bailiff upon the occasion aforesaid into a suit

literarū dñi papæ, & quoniā hoc est manifestè contra coronā & dignitatē nostram, & etiam contra pacē nostram q aliquis ballivus noster occasione ministerii sui, vel p aliquo q ad cōservationē pacis nostræ pertineat, vel p justicia facienda, trahatur in placitum in curia Christianitatis, cùm eorū facta nr̃a reputemus in hac pte, vobis phibem[2], &c. ut supra. T. &c. Et cōsimile br̃e fiat clerico qui sequit̃, & qui poti[2] capi debeat et in prisoñ mitti.

Cap. VI.

1. Prohibitio de eo, qui dicebat se tenere per legem Angliæ, et in curia Christianitatis probare voluerit pueros suos legitimos, qui revera bastardi sunt.

Est etiam breve phibitionis in casu ubi quis tenere se dicebat p legem Angliæ, & cùm disseysitus esset et tulisset breve de nova disseysina ad seysinam recuperandā, objectum esset ei q recuperare nō potuit, eo q pueri[1] ratione quorū ad vitam suam teñere debeat,[2] cûm in curia Christianitatis illos pbare velit[3] ad legitimos, q facere nō debuit, secuta fuit phibitio in hac forma. Rex tali episcopo salutē. Ostensum est nobis ex parte A. q cum B. nuper in curia nostra &c. nuper arramaverit assi. no. diss. versus eundē A. de teneñto in tali villa, qđ idē B. dicebat se tenuisse p legē Angliæ, et idē A. p cōsiderationē ejusdē curiæ nr̃æ ĩde recessisset sine die versus eūdē B. eo q pueri, quos habuerat de uxore sua tali, cujus hæreditas tenemenť illud fuerat, & ratione quorū puerorū idē B. clamavit tenere illud tenemētū ad vitam suā p legē Angliæ secundū regni nostri consuetudinem, nati fuerunt ante matrimonium contractum

[1] "pueros non habuit," MS. Rawl. C. 159.

[2] debuit," MSS. Rawl. C. 160 and 159.

[3] "vellet," MS. Rawl. C. 160.

before you by the authority of letters from the lord the pope, and since it is manifestly against our crown and our dignity, and also against our peace, that any bailiff of ours upon any occasion of his office or on account of anything which pertains to the preservation of our peace or for executing justice should be drawn into a suit in the court of Christianity, since we account their acts as our own in this part, we prohibit you &c. as above. Witness, &c. And let a similar writ issue to the clerk who sues, and who ought rather to be seized and committed to prison.

Chapter VI.

1. A prohibition against him who says, that he holds by the law of England, and in the court of Christianity seeks to prove that his sons are legitimate, who are in truth bastards.

There is likewise a writ of prohibition in the case where a person says that he holds by the law of England, and when he has been disseysed and has brought a writ of novel disseysine to recover seysine, it has been objected to him that he could not recover, inasmuch as his sons, in respect of whom he is entitled to hold for his life [are bastards], when he seeks to prove in the court of Christianity that they are legitimate, which he ought not to do, a prohibition has followed in this form: The king to the bishop greeting. It has been shown to us on the part of A. that when B. has lately in our court, &c. instituted an assise of novel disseysine against the said A. concerning a tenement in such a vill, which the said B. said that he held by the law of England, and the said A. by a resolution of our said court withdrew thence without a day against the said B., inasmuch as the sons, whom he had by so-and-so his wife, whose inheritance that tenement was, and in respect of which sons the said B. claimed to hold that tenement for his life by the law of England according to the custom of our realm, were born before matrimony was contracted between the said B.

inter ipsum B. et talem uxorem suam, sicut in eadem curia nostra recognitum fuit per confessionem ipsius B. et etiam cõtra eum præsumptum, eo quòd idem B. prius fuit in curia nostra[1] cum præfatali[2] quam nunc dicit uxorem, et cùm ín probatione esset in curia nostra, idem B. venit cum ea sicut serviens, et non ut maritus, nec aliqua facta fuit mentio in brevi, per quod ipsa placitaret, quod virum haberet, prædictus B.
f. 405 postea ad deceptionẽ curiæ nr̃æ et ad infirmandũ judiciũ in curia nr̃a factũ trahit ipsum A. in placitum corã vobis in curia Christianitatis, autoritate literarũ dñi papæ, ad p̃dictos pueros legitimandos, ut sic p̱ aliam viam rehabere posset tenementũ q̃d amisit, & q̱ pueri sui sic succedere valeant in bonis paternis & maternis. Et cum nõ possint judices aliqui de legitimitate cognosceř quoad hæreditatẽ & successionẽ habendam, nisi fuerit loquela prius in curia nr̃a incepta per br̃e, et ibi bastardia objecta, et postea ad curiã Christianitatis trãsmissa, vobis p̱hibemus q̱ in placito illo ulteriûs nõ p̱cedatis, nos enim, cùm p̃dicti pueri ad nos venerint, in p̃dicta curia nr̃a de p̃dicto tenemento eis justiciam exhibeamus,[3] secundũ consuetudinẽ regni nostri, ubi si eis bastardia objecta fuerit, mandabimus ordinario loci ut de ipsorũ legitimatione cognoscat, si ad ipsum fuerit in hac parte cognitio demandanda. Est etiam p̱hibitio huic cõsimilis, & magis aperta, de quodam Waltero Muschet, q̱ non valet cognitio de legitimitate quoad successionẽ, nisi sic fuerit a curia regia demãdata, et est p̱hibitio talis.

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[1] " in eadem curia nostra," MS. Rawl. C. 160.

[2] " cum præfata tali," MS. id.

[3] " exhibebimus," MS. id.

and his said wife, as has been recognised in our said court by the confession of the said B. and has also been presumed against him, inasmuch as he has appeared previously in our court with the aforesaid so-and-so whom he now asserts to be his wife, and when a matter was in course of proof in our court, the said B. came with her as her serving man, and not as her husband, nor was any mention made in the writ, by which she sued, that she had a husband, the aforesaid B., afterwards to the deception of our court and to f. 405. invalidate the judgment made in our court, draws the said A. into a plea before you in the court of Christianity by the authority of letters from the lord the pope in order to legitimate the aforesaid sons, that so by another road he might recover the tenement which he has lost, and that his sons may so succeed to their paternal and maternal goods. And since no judges can duly proceed to hold cognisance concerning legitimacy as regards an inheritance and succession to property, unless a trial has been previously commenced in our court and bastardy has been there objected, and the cause has been thereupon transmitted to the court of Christianity, we prohibit you that you should not proceed further in that suit, for we also, when the aforesaid boys shall have come to us, will administer to them justice in our aforesaid court concerning the aforesaid tenement, where, if bastardy be objected to them, we shall send a mandate to the ordinary of the place, that he should hold cognisance concerning their legitimacy, if the cognisance ought to be committed to him on this behalf. There is a prohibition like this, and more open, concerning a certain Walter Muschet, that the cognisance concerning legitimacy with respect to a succession is not valid, unless it has been ordered by the royal court, and the prohibition is of this kind.

2. Si quis voluerit in curiaChristianitatis legitimationem suam probare, antequam inquisitio esset judicibus per curiam regiam demandata per Willielmum Muschet.[1]

Rex talibus judicibus salutē. Ostensum est nobis ex parte A. q, cùm in curia nr̃a coram justiciariis nostris ꝑximo itinerantibus in tali coñ arramavit quādam assisam mortis antecessoris versus B. de quadam terra in N., idem B. timens sibi posse opponi notam bastardiæ in eadē assisa, et ante p̃dictū adventu justiciariorr̃, et anteqm ei bastardia opponatur in curia nr̃a in eadē assisa, et anteqm fuerit ꝑ nos ordinario loci inquisitio de legitimitate ꝑbanda secundū regni nr̃i cōsuetudinē demādata, literas dñi papæ ad vos directas impetravit, ut de legitimitate sua cognoscatis, & ad ꝑbationē illius testes admittatis, ut ꝑ hoc remaneat hæreditas & successio cōtra cōsuetudinē regni nostri q̃ hucusq̃ obtinuit, ut approbata et à Sede Apostolica cōfirmata, q in causa successionis & hæreditatis petitione debet prius placitū moveri in curia nostra, & cū ibi objecta fuerit bastardia, tunc delnde trāsmitti debet recordū loquelæ et cognitio bastardiæ ad curiā Christianitatis, ut ibi ad mandatum nr̃m de legitimitate inquiratur, qd̃ quidē nō est in hac ꝑte observatū. Et cū hoc sit manifestè cōtra cōsuetudinē regni nr̃i, q habita vel habenda inter alios[2] cōtentione de jure successionis debeatis ad inquisitionē de legitimatiōe ꝑcedere, anteqm à nobis hoc fuerit vobis demādat̃, vobis ꝓhibemus, &c. ut supra.

3. Si petens teneti vel e contrario bastardiam objicerit, et

Est etiā alterius modi ꝓhibitio, cū petēs tenēti bastardiā objecerit, & ordinario loci fuerit inquisitio demādata, si mortuo petēte vel tenēte velit ordinarius sine novo mādato in ꝑsona hæredis ad inquisitioñ ꝑcedere. Rex tali ordinario salutē. Ostēdit nobis A.

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[1] "Willielmum Muschet," should be written Walterum Muschet, which is supported by MS. Rawl. C. 160, and accords with Bracton's text.

[2] "aliquos," MS. Rawl. C. 159.

2. If a person seeks to prove his legitimacy in the court of Christianity, before an inquest has been ordered in the king's court, in the case of William Muschet.

The king to judges so-and-so greeting. It has been shown to us on the part of A. that, when in our court before our justiciaries in their last iter in such a county he has instituted a certain assise of mortdancester against B. concerning a certain land in N., the said B. fearing that there should be objected to him the brand of bastardy in the same assise, and before the aforesaid arrival of our justiciaries, and before that bastardy had been objected to him in our court in the same assise, and before that an inquest concerning the proof of his legitimacy had been committed to the ordinary according to the custom of our realm, sued out letters from the lord the pope directed to you, that you should hold a judicial inquiry into his legitimacy and admit witnesses to the proof of it, that thereby he should retain an inheritance and succession contrary to the custom of our realm, which has hitherto prevailed, as approved and confirmed by the apostolic see, that in a cause of succession and a claim of inheritance a plea ought first to be moved in our court, and when bastardy has been there objected, then there ought thereupon to be transmitted a record of the argument and the cognisance of the objection of bastardy to the court of Christianity, that upon our mandate inquiry be there made concerning legitimacy, which has not been observed in this behalf. And since it is manifestly against the custom of our realm that, if a contention has been raised or is about to be raised between others concerning the right of succession, you should proceed to an inquest concerning legitimacy before a mandate has been sent to you, we prohibit you, &c. as above.

3. If a claimant has objected to a tenant bastardy, or the converse, and the

There is likewise another kind of prohibition, when a claimant has objected bastardy to a tenant, and an inquest has been committed to the ordinary of the place, if upon the death of the claimant or of the tenant the ordinary seeks without a new mandate to proceed to an inquest in the person of the heir. The king to such an

mortuo eo, cui fuit objectum, velit judex inquirere de legitimatione filii, cum hoc non sit ei demandatum.

filius & hæres B. q, cū C. in curia nr̃a corā justic. ultimò itinerātibus in com̃ tali peteret versus eūdē B. tantū tr̃æ &c. p assisā mortis antecessoris inde ibi inter eos sum̄onitā, & idē B. objecerit eidē C. bastardiā in eadē curia, & cognitio vobis esset demādata, & pēdēte īquisitiōe illa, idē B. diē clausit extrem̄, vos p̃fatū A. filiū & hæredē p̃dicti B. vocari fecistis in judiciū p̃dicta occasiōe, ut in p̨sona hæredis defuncti p̨cedat inquisitio sine alio mādato, et quia si cōtingat q altera p̨tiū inter quas agitur in cur̃ nr̃a

f. 405 b.

decedat, tota loquela illa cadit & remanet, nec super eodē p̨cedi poterit contra hæredē defuncti, nisi p br̃e nostrū de novo cōtra ipsum p̨petratū,[1] vobis mandamus q in cognitione p̃dictæ causæ cōtra p̃fatum A. de cætero nō p̨cedatis, donec à nobis aliud inde habueritis mandatum. Teste &c.

Cap. VII.

1. Quibus fieri debet p̨hibitio.

Quibus fieri debet p̨hibitio videndū, & sciendū q tam ei qui tenet placitū q̃m ei qui sequitur, sive plures sint judices delegati sive subdelegati, sive unus, sicut ordinarius quicūq̃, si unus qui sequitur sive plures, licet prima facie videat̃ q sufficere debeat si tantū judici fiat p̨hibitio, quia si judex p̨cedere noluerit, non valebit, quāvis querens sequi velit, quia non ibi erit judiciū quasi deficiēte judice, si autē p̨ti tantū & ipse sequi voluerit,[2] nullū erit judiciū ratiōe supradicta, quia non valet si judex tenere vellet, si

[1] "mpetratum," MS. Rawl. C. 160.

[2] "noluerit," MS. id.

ordinary greeting. A. the son and heir of B. has shown to us that, when C. in our court before our justiciaries on their last iter in such a county claimed against the said B. so much land &c. by an assise of mortdancester summoned there before them, and the said B. objected to the said C. bastardy in the said court, and the cognisance was committed to you, and whilst the inquest was proceeding the said B. closed his last day, you have caused the aforesaid A. the son and heir of the said B. to be called into judgment on the aforesaid occasion, that the inquest should proceed in the person of the heir of the defunct without another mandate, and because if it happens that one of the parties between whom proceedings are taken in our court should die, the whole trial falls and is stayed, nor can proceedings be taken on the same subject against the heir of the defunct, except through our writ sued out afresh against him, we command you that you proceed no further in the cognisance of the aforesaid cause against the aforesaid A. until you have another mandate thereon from us. Witness &c.

person having died, against whom the objection has been raised, the judge seeks to inquire into the legitimacy of the son, when this has not been committed to him.

f. 405 b.

Chapter VII.

We must see to whom a prohibition ought to be directed, and it is to be known that it should be directed as well to him who holds the plea, as to him who sues, whether there be several judges delegate or sub-delegate or one as an ordinary, and if there be one who sues or several, although at first sight it seems that it ought to be sufficient if a prohibition be issued to the judge alone, because if the judge should not be willing to proceed, it will be of no avail, although the claimant wishes to sue, because there would not be there a judgment inasmuch as a judge would be as it were wanting, but if to the party alone and the judge sought to proceed, there would not be any judgment for the reason aforesaid, for it does not avail if the judge wishes to persist, if there

1. To whom a prohibition ought to be directed.

non sit qui sequatur, & sic nō erit judiciū. Melius tamen erit q̄ omnibus fiat generaliter, ne judices vel querens impunè posset p̄cedere. Sed quid si judices delegati alios sibi subdelegaverīt, & qui cognoverint de causa, videndum quibus fieri debeat p̄hibitio, utrū vz. principalibus vel subdelegatis, & tunc refert utrū ita subdelegaverint, vz. ad certum diem, vel sic quòd sibi reservaverint principalia judiciorum, videlicet principium, medium, & finem, scilicet contestationem et dispensationem super contestationibus & diffinitivam sentētiam, et quo casu videtur q̄ locum habere debet p̄hibitio, cū sic sibi aliquid reservaverint, & ipsi autoritatē subdelegatis p̄stiterint, cùm ipse facere videtur cujus autoritate fit. Si autē se ad totā causam excusaverint & nihil sibi reservaverit,[1] tūc refert utrū hoc fecerint ante p̄hibitionē̄, vel post. Si autē ante p̄hibitionē, nō credentes aliquā intervenire posse p̄hibitioc̄, tūc sufficit si p̄hibitio fiat subdelegatis. Si vero post p̄hibitioñ, tunc p̄sumi possit q̄ hoc fecerit per fraudem. Et ideo tenebit p̄hibitio facta in personis eorū, quasi nulla facta subdelegatione.

Cap. VIII.

1. Si judices prohibitionem admittere recusaverint et superveniat illa prohibitio, estimare debent an

Proposita sic exceptione cōtra jurisdictionē (ut p̄dictū est) & cùm illam admittere recusaverint, superveniat prohibitio, et facta examinatione an eorum sit jurisdictio vel non, decreverit supersedendum, tunc remaneat querentis prosecutio. Si autem dubitaverint utrum

[1] " reservaverint," MS. Rawl. C. 160.

be no one who sues, and so there will not be a judgment. It will be better that a prohibition should issue to them all generally, lest the judges or the plaintiff might proceed with impunity. But what if judges delegate have sub-delegated others, who have held cognisance of the cause, it is to be seen to whom the prohibition ought to go, whether to the principals or to the sub-delegates, and then it matters whether they have sub-delegated them for a certain day, or on such conditions that they have reserved to themselves the principal parts of the judgments, to wit, the commencement, the middle and the end, to wit, the settlement of the issue and the dispensation of certain issues and the definitive sentence, and in which case it seems that a prohibition ought to issue to them, since they have thus reserved something for themselves, and they have themselves furnished authority to the sub-delegates, since he seems to do a thing by whose authority it is done. But if they have excused themselves for the whole cause and reserved nothing for themselves, then it is of importance whether they have done this before or after the prohibition. But if before the prohibition, not believing that any prohibition could intervene, then it is sufficient, if the prohibition issue to the sub-delegates. But if after the prohibition, then it may be presumed that they have done it through fraud. Therefore a prohibition made in their persons will bind them, as if no sub-delegation had been made.

Chapter VIII.

1. If the judges have refused to admit a prohibition, and a prohibition supervenes, they ought

Upon an exception having been thus propounded against the jurisdiction (as aforesaid), and when they have refused to admit it, let a prohibition supervene, and upon an examination having been made whether the jurisdiction is theirs or not, if it should be decreed to supersede it, then let the suit of the plaintiff be stayed.

eorum sit jurisdictio, et si dubitaverint, debent consulere justiciarios, et de hujusmodi consultationibus dicatur.

supersedendum sit vel non, solent judices aliquando justiciarios cōsulere utrū ꝑcedere possent vel necesse haberent supersedere, & utrum ad eos ꝑtinet cognitio vel non ꝑtinet, & quo casu fuit eorū consultationibus per judices multis modis responsum, secundum q̄ prohibitio locū habere debet vel non habere, & fit hūe hujusmodi de respōsione faciēda sub nomine justiciariorū.

2. Breve ad respondendum consultationi judicum per justiciarios de nova garba. Cod. l. ii. tit. 1, § 3. De edendo.

Viris venerabilibus, vel dilectis sibi in Christo tali & cōjudicibus suis salutē. Literas vestras suscepi, cōtinentes q̄ cùm q̃dam causa, q̃ vertitur coram vobis inter A. priorē et cōventū talē et B. talē clericū vel laicū, facta vobis editione (ut dicitis) super nova garba ſræ ipsi[9] B. p̃dictis A. priori et cōventui quondā in ꝑpetua eleemosina collata, autoritate literarū dñi papæ examini vestro sit cōmissa, & cùm ex earundē autoritate literarum, in eadem causa jam inceperitis ꝑcedere, idē B., ne de laico feodo suo in curia Christianitatis ꝑcedatis, vobis literas dñi regis ꝑhibitorias porrexerat, unde à nobis consiliū requiritis vel petitis, utrū in causa illa ꝑcedendū sit vel supersedendū, ad q̄ vobis vel cōsultationi vestræ duxim[9] respōdendū, vel aliter sic. Desiderio igitur vestro satisfacere cupiētes vel volētes, cōsultationi vestræ in hac parte sic duximus respōdendū, q̄ si p̃dictus A. prior & cōventus, novam garbam illā aliquo tēpore perceperūt, et inde in possessione pacifica fuerint ꝑ aliquod tēpus, et inde spoliati

But if they doubt whether it should be superseded or not, the judges are accustomed sometimes to consult the justiciaries whether they may proceed, or whether they hold it to be necessary to supersede the proceedings, and whether the cognisance belongs to them or not, and in which case answers are made in many ways to the consultations of them on the part of the judges, according as a prohibition ought to have place or not, and a writ of this kind issues concerning the making of an answer in the name of the justiciaries.

to weigh well whether the jurisdiction is theirs, and if they doubt, they ought to consult the justiciaries, and we must speak of such consultations.

2. A writ to answer to a consultation of the judges by by the justiciaries concerning a new sheaf.

To the venerable men, or to his beloved in Christ so-and-so and his associated judges greeting. I have received your letter, containing that since a certain cause, which is controverted before you between A. the prior and the convent of such a place and a certain B. a clerk or laic, a declaration of the ground of action having been made to you as you say concerning a new sheaf of the land of the said B. conferred formerly in perpetual alms upon the aforesaid A. the prior and convent, has been committed to your examination by the authority of letters from the lord the pope, and since upon the authority of those letters you have already began to proceed in the said cause; the B. has exhibited to you prohibitory letters from the lord the king, that you should not proceed in a court of Christianity concerning a lay feud, whereupon you require or seek counsel from us, whether you should proceed in that cause or should supersede further proceedings, upon which we have thought it right to reply to you or to your consultation; or otherwise thus: Desiring therefore or being willing to satisfy your desire, we have thought it right to reply to your consultation on this behalf, that if the aforesaid A. the prior and the convent have gathered there a new sheaf for some time back, and have been in peaceful possession thereof during some time, and have been spoiled of it unjustly, you may proceed securely in the ecclesiastical court, notwithstanding the royal prohi-

injustè, super restitutiõe illius nòvæ garbæ, (si vobis hoc cõstiterit in veritate) in foro ecclesiastico secure potestis ꝓcedere nõ obstante regia ꝓhibitione. Si autẽ in possessïone inde nõ fuerint nec inde recẽter spoliati injuste, tũc magis expedit vobis supersedere qm̃ ꝓcedere, quia si ꝓcederitis, hoc ésset in p̃judiciũ regiæ dignitatis. Fiat quandoq̃ respõsio cõsultationibus sub nomine regis, quãdoq̃ sub noïne justic.: brevi[2] tamẽ et rectius poterit cõsultationib' respõderi examinata judiciũ [1] cõsultatiõe hoc modo. Talibus judicibus salutẽ. Inspectis literis vestris, quas nobis transmisistis, et plenius intellectis (sine p̃judicio melioris sententiæ) consultationi vestræ duxim[2] respõdẽdum, q̃ si res ita se habet sicut in cõsultatione vestra nobis exposuistis, videtur nobis q̃ in causa ista bene potestis ꝓcedere, non obstante regia ꝓhibitione. Est etiã alius modus consultationis & responsionis per M. de P. q̃ ꝓhibitio locũ non habet inter ecclesiasticas ꝑsonas, ut si viri religiosi teneantur alicui clerico in annuo redditu p̃ chartam et sub p̃statione sacramenti, si clericus velit agere in foro ecclesiastico.

3. Aliud breve et alterius modi, si clericus clericum de eodem.

Tali N. et cõjudicibus suis talibus salutẽ. Literas cõsultationis vestras benignè suscepi, & qua decuit diligentia inspexi, & quibus inspectis et intellectis, vobis et cõsultationi vestræ si [2] duximus respõdendũ, q̃ cùm juri canonico sit contrariũ, q̃ si clericus clericũ et maximè viros religiosos cõvenerit corã judice ecclesiastico, quod iidem religiosi quasi religionis suæ ïmemores, et de ecclesia (salva pace eorũ) male scientes, ut negotii ꝓcessũ impediant, et judiciũ ecclesiasticũ subterfugiãt, et maxime super annuo redditu p̃ eorũ

[1] "judicum," MS. Rawl. C. 160. | [2] "sic duximus," MS. id.

bition concerning the restitution of that new sheaf (if you have been satisfied of the truth of it). But if they have not been in possession thereof nor have been recently spoiled thereof unjustly, then it is more expedient to supersede the proceedings than to continue them, because if you should proceed, it would be to the prejudice of the royal dignity. Sometimes the answer may be made in the name of the king to the consultations, sometimes in the name of the justiciaries. A reply, however, may be made briefly and more correctly after an examination of the consultation of the judges in this manner: To judges so-and-so greeting. Upon an inspection of your letter, which you have transmitted to us, and upon full consideration of its contents (without prejudice to a better opinion), we have thought fit to reply to your consultation, that if the matter be of such a kind as you have expounded to us in your consultation, it appears to us that you may well proceed in that cause, notwithstanding the royal prohibition. There is also another mode of consultation and reply made by Martin de Pateshull because a prohibition has no place between ecclesiastical persons, as if persons under religious vows are bound to a certain clerk for an annual rent by a charter, and under the sanction of an oath, if the clerk wishes to proceed in an ecclesiastical court.

3. Another writ and of another mode, if a clerk sues a clerk for the same.

To so-and-so N. and so-and-so his associate judges greeting. I have received favourably your letters of consultation and have inspected them with becoming diligence, and having inspected them and well considered them, we have thought that this reply should be given to your consultation, that, since it is contrary to the canon law, if a clerk should sue a clerk and especially clerks under religious vows before an ecclesiastical judge, that the said clerks under religious vows, as if forgetful of their religious vows and ill-disposed towards the church (saving their peace), that they may encumber it with a process, and may escape from an ecclesiastical judgment, and particularly being bound to pay an

chartā et juramēto obligati, ad ꝑhibitionē regiā maliciosè recurrāt, advertat discretio vestra, ꝙ in casu ꝓposito nō obstat regia ꝑhibitio, et ꝓcedatis secure, ne subterfugiēdi detur ꝑniciosa occasio, quia si ipsi cōveniantur in seculari judicio, se ibi tuerētur fori privilegio, quia fortè diceret ꝙ clerici essent, et ideo ꝙ non tenerentur respondere in foro seculari ratione ordinis clericalis et ꝑsonæ suę, & sic videtur ꝙ causa secularis et res trahitur ad forum ecclesiasticum ꝓpter privilegium ꝑsonæ ecclesiasticæ, ꝙ esse non deberet (ut videtur) quia, si illud privilegium haberet pro se ne responderet in foro seculari, merito illud contra se haberet ne ei in eodē foro responderetur. Nec etiam valere deberet (ut videtur) illud quod superius dictū
f. 406 b. est, quòd propter recentem spoliationem mutari debet jurisdictio de re temporali, non magis de redditu quàm de laico feodo, ubi remedium habere posset in foro seculari per assisam novæ disseysinæ, vel hujusmodi, secundum ꝙ redditus fuerit talis vel talis.

Cap. IX.

1. Ubi et quando et quibus rebus locum habet prohibitio, ratione personarum et rei.

Ut autē consultationibus judicū meliùs possit respōderi, videre non est inutile, ubi & quando locum habere debeat ꝑhibitio, & de quibus rebus, et quando nō. Et si non in toto, in ꝑte tamē ꝑ exceptionē. Et sciendum, ꝙ locum habet ꝑhibitio ne judiciū ꝓcedat in foro ecclesiastico, quādoq̃ ratione ꝑsonarum & rei de

annual rent in virtue of a charter and their oath, should have recourse maliciously to a prohibition from the king, your discretion may observe that in the proposed case the royal prohibition is not an obstacle, and you may proceed securely, lest a pernicious occasion for escaping judgment should be afforded, because if they were to be convened before a secular judge, they would defend themselves by their privilege of a tribunal, because they would perhaps say that they were clerks, and accordingly that they were not bound to answer in a secular court by reason of their clerical order and character, and so it seems that a secular cause and matter is drawn into an ecclesiastical *forum* on account of the privilege of the ecclesiastical character, which ought not be (as it seems), because if he should have that privilege on his own behalf not to answer in a secular court, he would deservedly have the converse against him that no one should answer to him in a secular court. Further it ought not to avail (as it seems) what has been observed above, that the jurisdiction should be changed on account of a recent spoliation, no more concerning a rent than concerning a lay fee, where he may have a remedy in a secular court through an assise of novel disseysine or such like, according as the rent is of this or of that character. f. 406 b.

Chapter IX.

But that an answer may be the better given to the consultations of the judges, it is not unprofitable to consider, where and when a prohibition ought to have a place, and concerning what things, and when not so. And if not in the entire matter, nevertheless in part through an exception. And it is to be known that a prohibition has a place to prevent a judgment proceeding in an ecclesiastical court, sometimes by reason of the persons and the matter which is the subject of the action,

1. Where and when and in what matters a prohibition has a place by reason of the persons or of the thing.

qua agitur, ut ibi cognitio merè ꝑtinet ad coronam & dignitatē regiam, ut si laicus laicū implacitaverit coram judice ecclesiastico de aliquo laico feodo, vel de aliquo q̄ ad laicū feodum ꝑtineat, quia jurisdictionem regiam in hac ꝑte mutare nō poterit aliq̄ privilegium, sicut privilegium cruce signatorū, vel alicujus alterius, etiam etsi rex hoc vellet, dissimulat tamen hoc quandoq̃, quavis hoc sit cōtra privilegium coronæ & dignitatis suæ. Itē jurisdictionē suam non mutat fidei interpositio, sacramētū ꝑstitum, nec spontanea renuntiatio ꝑtium, quamvis sibi ipsis in hac parte ꝑjudicent ꝑ consensum. Et illud idē dicendum erit de debitis & catallis, quæ nō sunt de testamento, vel matrimonio, vel eorū sequela. Itē locum habet ꝑhibitio ratione ꝑsonarum vel rei, ut si clericus laicum, vel laicus clericū, in foro ecclesiastico traxerit de aliquo prædictorum. Itē ratione rei tantū, ut si de aliquo ꝑdictorū clericus in foro ecclesiastico clericū traxerit in placitū, quia si judex ecclesiastic[9] inter tales judicaverit, judicium suū executioni mandare nō poterit, quia nō est vicecom̃ nec alius minister, qui in executione facienda ei obtēperet, et si ipse exequi voluerit, locū habebit cōtra ipsum assisa novę disseysinæ, et cōtra eum qui sequitur, de laico feodo dico ad differentiam liberæ eleemosinæ, quæ magis ꝑpriè dicitur libera cùm sit quasi Deo dedicaꝑa, sicut ĩra data ecclesiæ nomine dotis tempore dedicationis, q̃ magis privilegiata est, et cujus cognitio ad forū spectat ecclesiasticum, quàm[1] sit pura & libera eleemosina data ecclesiis & viris religiosis, et de qua jurisdictio & cognitio ꝑtinet ad

[1] " quum sit pura," MS. Rawl. C. 160.

where the cognisance pertains absolutely to the crown and the dignity of the king, as if a layman has impleaded a layman before an ecclesiastical judge concerning a lay feud or concerning something which pertains to a lay feud, because a privilege cannot change the king's jurisdiction in this behalf, as for instance the privilege of those who are under the vow of a crusade or of any other person, even although the king so wishes, he dissembles however sometimes in this matter, although it be against the privilege of his crown and his dignity. Likewise neither the interposition of a promise nor the taking of an oath, nor the spontaneous renunciation of parties changes his jurisdiction, although the parties may prejudice themselves by consent. And the same thing will have to be said concerning debts and chattels, which are not testamentary nor matrimonial, or the sequel of them. Likewise a prohibition has place by reason of the persons or of the thing, as if a clerk has drawn a layman or a layman has drawn a clerk into the ecclesiastical court concerning any of the aforesaid matters. Likewise by reason of the thing, as if a clerk has drawn a clerk into an ecclesiastical *forum* into a suit on any of the aforesaid matters, because if the ecclesiastical judge has judged between the said parties he cannot put his judgment into execution, because there is no viscount or other officer who would obey him in putting it into execution, and if he should seek to put it into execution by himself, an assise of novel disseysine will lie against him and against the party who sues, I speak of a lay feud in distinction from free alms, which is with more propriety called free, since it is dedicated as it were to God, like land given to the church in the name of dower at the time of dedication, which is more privileged, and of which the cognisance belongs to the ecclesiastical court, since it is pure and free alms given to churches and to men under religious vows, and concerning which the jurisdiction and the cognisance pertains to the secular

forum seculare. Itē locū habet ꝓhibitio ratione rei, sicut de laico feodo q̄ alicui descēdit ex causa successionis, ut si judex ecclesiasticus cognoscere vellet de successione, ad querelam clerici vel laici locum habet prohibitio ratione rei.

2. Ratione contractus. Item & eodē modo ratione cōtractus, ut si clericus cōtrahat cum laico in causa alicujus emptionis et venditionis de aliqua re seculari, de qua cognitio ꝓtineat ad forum seculare.

3. Ratione delicti. Itē & eodē modo locum habet ꝓhibitio ratione delicti, ut si clericus delinquat contra clericum vel laicum, vel laicus contra laicum in re temporali, ratione delicti, vel facti, pertinet cognitio ad forum seculare, tam in actione injuriarum quàm criminis, dum tamen civiliter agatur, & in quibus casibus omnibus judex
f. 407. secularis habet cognitionem & cohercionē, et judex ecclesiasticus nō nisi ꝓ dissimulationē. Si autem criminaliter agatur & super crimine, judex ecclesiasticus nō habebit jurisdictionē, licet habere debeat judicii executionē. In casu enim sanguinis judicare non potest nec debet, ne cōmittat irregularitatem. Pertinet igitur (ut videtur) ad judicē secularem cognitio, & ad judicē ecclesiasticū judicii executio, quia judex secularis degradare non potest, non magis quam ad ordines ꝓmovere, sicut superius dictum est in parte.

Cap. X.

1. Quando et in quibus locum non habet prohibitio, Quando & in quibus locū non habeat ꝓhibitio dicendū. Et sciendū q̄ locū nō habebit ꝓhibitio in curia Christianitatis de aliquo spirituali vel spiritualitati annexo, sive agatur inter clericos sive inter clericū

forum. Likewise a prohibition has place by reason of the thing, as concerning a lay feud which descends to a certain person by way of succession, as if an ecclesiastical judge seeks to hold cognisance of a succession, upon the complaint of the clerk or the laic a prohibition has place in regard of the thing.

2. In respect of a contract.

Likewise in the same manner also in respect of a contract, as if a clerk should contract with a laic in a cause of buying and selling concerning a certain secular thing, the cognisance of which pertains to the secular *forum.*

3. In respect of an offence.

Likewise in the same manner a prohibition has a place in respect of an offence, as if a clerk has committed an offence against a clerk or a laic, or a laic against a laic in a temporal matter, in respect of the offence or the act the cognisance belongs to the secular *forum* as well in an action of tort as of crime, provided the proceedings are of a civil character, and in all of which cases the secular judge has cognisance and f. 407. coercion, and the ecclesiastical judge not so, except through dissimulation. But if the proceedings be criminal and respecting a crime, an ecclesiastical judge shall not have jurisdiction, although he ought to have the execution of the judgment. For in a cause of blood he cannot and ought not to judge, lest he commit an irregularity. The cognisance therefore pertains (as it seems) to the secular judge, and the execution of the judgment to the ecclesiastical judge, for the secular judge can no more degrade than he can promote to orders; as has been said in part.

Chapter X.

1. When and in what matters a prohibition has not a place as

When and in what matters a prohibition has no place we must now discuss. And it is to be known that a prohibition will not have a place in the court of Christianity concerning anything spiritual or annexed to the spirituality, whether the proceeding be between

sicut de re sacra vel quasi.

et laicū, vel ubi agatur ex causa testamentaria vel matrimoniali, vel de aliquo de quo sit pœnitentia injungēda p̄ peccato. Item locū non habebit p̄hibitio si in curia Christianitatis agatur de aliquo tenemēto quod si[1] sacrū, et p̄ pontifices Deo dedicatū, sicut sunt abbatiæ, prioratus, & monasteria, & horū cæmiteria. Item quasi sacra, quia spiritualitati annexa, sicut sunt t̄ræ datæ ecclesiis tēpore dedicationis, cū ædificiis in eadem contentis, & in p̄tinentiis eorū. Unde si ecclesia vel monasteriū de hujusmodi t̄ra in dotem data, vel de ejus p̄tinentiis sicut de cōmunia pasturæ & hujusmodi fuerit spoliata, si in foro ecclesiastico de restitutione agatur, locū non habebit p̄hibitio, quod quidē nō est intelligendū de libera eleemosyna quamvis sit pura. Nota q̄ nō jacet p̄hibitio in dote ecclesiæ, jacet tamē in libera & pura eleemosyna. Et de hac materia habetis de term̄ P. añ regis H. xv. in com̄ Som̄ de Richardo p̄sona de Hideford. Et ad hoc facit expresse q̄ habetis de term̄ S. H. anno regis H. vii. in com̄ Bedf. de Gylberto p̄sona de Denhā. Itē nec locum habebit p̄hibitio si in foro ecclesiastico agatur, & hoc ratione p̄sonarū, sicut de catallis clericorū eis violenter ablatis, ut de term̄ S. H. añ regis H. viii. in com̄ Cornubiæ de Ewerino de le Lind. Itē locū non habebit p̄hibitio si de decimis agatur, vel si erratū fuerit in forma p̄hibitionis, ut si fiat p̄hibitio de debitis ubi fieri debet de catallis, vel e contrariò: ut de term̄ S. H. añ regis H. vi. in com̄ Warr̄ de quodā p̄centore

[1] "quod sit sacrum," MS. Rawl. C. 160.

clerks or between a clerk and a laic, or where the proceeding is in a testamentary or a matrimonial cause, or concerning any matter for which penance is to be enjoined for a sin. Likewise a prohibition will have no place, if there be a proceeding in the court of Christianity concerning any tenement, which is sacred and dedicated to God by pontiffs, such as are abbeys, priories, and monasteries, and their cemeteries. Likewise tenements as it were sacred, because they are annexed to the spirituality, such as lands given to a church at the time of its dedication, with the buildings contained on them and their appurtenances. Hence if the church or the monastery has been spoiled of this kind of land which has been given in dower or its appurtenances, as of common of pasture and such like, if proceedings are had in the ecclesiastical court for restitution, a prohibition shall not have place, which is not indeed to be understood of land in free alms, although it be pure. Note, a prohibition does not lie in the dower of a church, but it lies in free and pure alms. And in this matter you have a case in Easter term in the fifteenth year of king Henry in the county of Somerset, concerning Richard the parson. And upon this bears expressly what you have in St. Hilary's term in the seventh year of king Henry in the county of Bedford concerning Gylbert the parson of Denham. Likewise a prohibition will not lie, if proceedings are had in the ecclesiastical court and this by reason of the persons, as concerning the chattels of clerks violently taken from them, as in St. Hilary's term in the eighth year of king Henry in the county of Cornwall, concerning Ewerin de le Lind. Likewise a prohibition will not lie, if the proceedings are concerning tithes, or if there has been an error in the form of the prohibition, as if the prohibition has been for debts when it ought to have been for chattels, or the converse: as in St. Hilary's term in the sixth year of king Henry

concerning a thing sacred, or as it were sacred.

Lyncolñ. Sed contra de decimis q̃ locū habet p̃hibitio, si decimæ petantur, vel earū p̃cium si vendātur ex vēditione: ut de terñ S. M. añ regis H. ix. incipiente x. in coñ Eborū de Richardo p̃sona de Mapeldon. Sed hoc solvitur sic, q̃ in primo casu cōvent[9] fuit primus & principalis debitor, ubi locū nō tenuit p̃hibitio, & in secundo casu cōventi fuerint fidejussores & implacitati, cùm ipse principalis debitor solvendo esset, & ubi post p̃hibitionem judicatū fuit in foro seculari q̃ p̃sona se caperet ad principalē debitorē, qui solvendo fuit, & fidejussores inde quieti: Et unde videtur q̃ si
f. 407 b. principalis debitor solvendo nō esset, quòd p̃sona agere posset in foro ecclesiastico cōtra fidejussores, nō obstante p̃hibitione. Itē locū non habebit p̃hibitio in causa testamentaria vel matrimoniali, quia hujusmodi genera placitorū specialiter excipiuntur, cùm sint spiritualia vel spiritualibus annexa. Itē nec de aliquibus quæ sunt eis accessoria, vel annexa: accessoria dico, sicut est obligatio fidejussonis,[1] ut in venditione decimarū, de qua superius dictum est. Itē de p̃missionibus factis, de pecunia danda ob causam matrimonii in initio cōtractus nomine maritagii. Secùs autē si tenementū p̃mittatur. Et q̃ hujusmodi pecunia peti possit nō obstante p̃hibitione, inveniri poterit de terñ S. M. an. regis H. xiv. incipiente xv. in coñ Suff., de Hugone de Monte Causa.[2] Ad idem facit q̃ habetis de terñ S. T. anno regis H. xv. in coñ Oxoñ, & unde prior

[1] "fidejussionis," MS. Rawl. C. 160.

[2] "Monte Caniso," MS. id.

in the county of Warwick, concerning a certain præcentor of Lincoln, But on the contrary concerning tithes that a prohibition has place, if tithes are claimed or their price after a sale if they should be sold, as in St. Michael's term in the ninth and tenth years of king Henry in the county of York concerning Richard the parson of Mapeldon. But this is solved in this manner, that in the first place the first and principal debtor was convened, where a prohibition did not maintain its place, and in the second case the sureties were convened and impleaded, when the said principal debtor was solvent, and where after the prohibition it was adjudged in the secular court, that the parson should have recourse to the principal debtor, who was solvent, and the sureties should rest quiet: and from this it seems that if the principal debtor were not solvent, that the parson may proceed in the ecclesiastical court against the sureties, notwithstanding a prohibition. Likewise a prohibition will not have place in a testamentary or in a matrimonial cause, because those kinds of suits are specially excepted, since they are spiritual matters or annexed to spiritual matters. Likewise not concerning any matters which are accessory to or annexed to them, such as the obligation of a surety as in the case of tithes, concerning which we have spoken above. Likewise concerning promises which have been made concerning money to be given with the object of matrimony at the commencement of the contract in the name of a maritage. Otherwise however if a tenement should be promised. And that money of this kind may be sued for notwithstanding a prohibition may be found in St. Michael's term in the fourteenth and fifteenth years of king Henry in the county of Suffolk concerning Hugo de Monte Caniso. To the same effect is a case which you have in Holy Trinity term in the fourteenth year of king Henry in the county of Oxford, and whereof the prior of Berncestre f. 407 b.

de Berncestre[1] fuit judex. Et sēper videndū erit, ꝑpter quid aliquid factū sit vel ꝑmittatur.

2. Quod ratione accessionis locum non habet prohibitio.

Itē ratione accessionis in causa testamētaria non habet locū ꝓhibitio si pecunia legetur, & petatur ut debitū in foro ecclesiastico ex causa testamentaria. Itē nec locū habebit ꝓhibitio, si testator pecuniā sibi debitā legaverit, dum tamē debitū in vita testatoris recognitū sit & ꝓbatū, quia hujusmodi pecunia inter bona testatoris cōnumeratur, & pertinet ad executores. Si autē petatur debitū ꝑ executores, de quo debitores in vita testatoris confessi nō fuerint nec cōvicti, vel nec post mortē gratis recognoverint, hujusmodi debitū inter bona testatoris nō cōnumeratur, et si ab executoribus vel ab hærede in foro ecclesiastico petantur, locum habebit ꝓhibitio, et in foro seculari oportebit agere, hujusmodi enim actiones hæreditariæ sunt & pertinent ad hæredes, & ideo legari non possunt, & sicut dātur hæredibus contra debitores et non executoribus, ita dantur actiones creditoribus cōtra hæredes & non cōtra executores.

3. Quod actiones legari non possunt.

Et q̄ actiones legari nō possunt, nec judices ecclesiastici inde recognoscere, nec executores petere debitū q̄ in vita testatoris nō est recognitū, ꝓbatur de term̄ S. H. anno regis H. vi. in com̄ North. de Radulpho ꝑsona de Irclinbourghe. Et q̄ actiones legari nō possūt, nec inter bona testatoris cōnumerantur, maxime de antiquo debito, ꝓbatur de term̄ P. añ regis H. xv. in com̄ Essex de Gervasio de Aldermābury. Ad idē facit q̄ habetis de term̄ P. añ regis H. xvi. in com̄ South. de Engelardo de Cygoiny.

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[1] "Bernecestre," MS. Rawl. C. 160.

was judge. And it will always have to be considered on account of what any thing has been done or is permitted.

2. That a prohibition has not a place in respect of accession.

Likewise in respect of accession in a testamentary cause a prohibition has not a place, if money be bequeathed and it be sued for as a debt in an ecclesiastical court as in a testamentary cause. Likewise a prohibition will not have a place, if a testator has bequeathed money due to himself, provided however the debt has been recognised and proved in the testator's lifetime; because money of this kind is reckoned amongst the goods of the testator, and belongs to his executors. But if a debt is sued for by executors, concerning which the debtors during the life of the testator have not made a confession nor undergone a conviction, nor after his death have made a spontaneous acknowledgment, a debt of this kind is not reckoned amongst the goods of the testator, and if it be sued for in an ecclesiastical court by the executor or by the heir, a prohibition shall have place, and he ought to proceed in a secular court, for actions of this kind are heritable and pertain to heirs, and therefore cannot be bequeathed, and as they are allowed to heirs and not to executors against debtors, so actions are allowed to debtors against heirs and not against executors.

3. That actions cannot be bequeathed.

And that actions may not be bequeathed, nor ecclesiastical judges hold cognisance of them, nor executors sue for a debt which has not been acknowledged in the life of the testator, is proved in St. Hilary's term in the sixth year of king Henry in the county of Norfolk, concerning Ralph the parson of Irclinbourghe. And that actions cannot be bequeathed nor are reckoned amongst the goods of a testator, especially in the case of an ancient debt, is proved in Easter term in the fifteenth year of king Henry in the county of Essex concerning Gervase de Aldermanbury. To the same effect is what you have in the sixteenth year of the reign of king Henry in the county of Southampton, concerning Engelard de Cygoiny.

4. Item non in causa testamentaria.

Itē nec locum habet ꝑhibitio in causa testamentaria, si catalla legentur et inde agatur in foro ecclesiastico. Itē nec, si in civitatibus & burgis legentur domus vel ædificia, q̃ habuit testator de ꝑquisito, cū sint quasi catalla testatoris. Secus tamen est in quibusdā locis si ꝑveniant ex descensu antecessoris, in quibusdam locis sicut in civitate Lond̄, ubi locū habet ꝑhibitio, si inde agatur. Itē locū non habet ꝑhibitio, si legetur usus fructus alicujus t̄ræ, ut si testator aliquam t̄ram tenuerit ad terminū annorū, et usū fructū legaverit, quia usus fructus inter catalla cōnumeratur, tenemēto in suo statu duraturo, sicut laicum feodum. Sed cùm terra ad terminum ita alicui data fuerit, refert utrum testatori tantum, vel testatori et hæredibus suis. Si autem testatori tantum, tunc poterit testator in vita dare et
f. 408. in morte legare sine præjudicio hæredum. Si autē sibi et hæredib⁹ suis, nō sic, nisi in vita dederit, ubi hæredes tenentur ad warrantiā, et eodē modo si legaverit expressè, si autē nullā mētionē inde fecerit, tunc transit usus fructus ad hæredes.

5. Si de facto suo effectus sit alterius jurisdictionis.

Itē locū non habet ꝑhibitio ubi quis de facto & cōsensu suo ꝑprio effect⁹ est alterius jurisdictionis, scilicet quantū ad se ipsū, sed nō quantū ad regē ad q̃m ꝑtinet jurisdictio, secundū q̱ superiùs dictū est: & ibi judiciū de renūciatione, q̱ nō potest quis in p̃judiciū alterius renūciare, factū tamen fuit contrariū, ut in rotulo de term̃ P. anno regis H. xvi. in com̃ Devon̄ de Thoma de Buttyler, Alfrido[1] in Cottone, q̱ renū-

[1] " et Alfrido," MS. Rawl. C. 160.

Likewise a prohibition has no place in a testamentary cause, if chattels are bequeathed, and thereon proceedings are taken in an ecclesiastical court. Likewise not, if in cities or in boroughs houses or buildings are bequeathed, which the testator has acquired for himself, since they are as it were the chattels of the testator. It is otherwise however in some places, if they are derived by descent from an ancestor, in certain places as in the city of London, where a prohibition has place, if an action is brought there. Likewise a prohibition has not place, if the usufruct of any land be bequeathed, as if the testator has held any land for a term of years and has bequeathed the usufruct, because usufruct is reckoned amongst chattels, when the tenement is likely to endure in its state, as a lay fee. But when land has been so conveyed to any body for a term, it is of importance whether it has been conveyed to the testator alone or to the testator and his heirs. But if to the testator alone, then the testator will be able to give it in his lifetime and on his death to bequeath it without prejudice to his heirs. But if to himself and his heirs, not so, unless he has given it in his lifetime, when the heirs are bound to a warranty, and in the same way, if he has bequeathed it expressly, but if he has made no mention of it, then the usufruct passes to his heirs.

4. Likewise a prohibition has no place in a testamentary cause.

f. 408.

Likewise a prohibition has not a place, where a person by his own act and with his proper consent has been made subject to another's jurisdiction, to wit, as far as regards himself, but not as regards the king, to whom the jurisdiction belongs according to what has been said above, and there a judgment was given on the subject of renunciation, that a person cannot renounce to the prejudice of another. The contrary however was done, as in the roll of Easter term in the sixteenth year of king Henry, in the county of Devon, concerning Thomas de Buttyler and Alfridus in Cottone, because a renunciation

5. If by his own act he has been made subject to another jurisdiction.

ciatio aliis p̃judicat q̃m renūtianti. Itē et eodē modo nō habebit locū p̃hibitio si quis effectus fuerit de alterius jurisdictione de facto suo p̃prio p̃ appellationem, ut si implacitatus fuerit corā judice ecclesiastico et nō suo, appellaverit ad aliū judicē nō suū, si ad p̃hibitionē regiā convolaverit ratione rei secularis q̃ petitur, quantū ad p̃sonā suam audiri non debet, licet nō quantū ad p̃sonā regis, ut supra dictū est, quia quos semel approbavit eos post reprobare nō potest.

6. Non habebit prohibitionem de recenti spoliatione.

Itē locū non habebit p̃hibitio de recēti spoliatione, ut si clericus clericū spoliaverit de decimis vel aliis, de quibus cognitio p̃tinet ad forū ecclesiasticū, quia de hujusmodi restitutione nō generatur p̃judiciū patronis, quantū ad jus advocationis.

7. Item in causa restitutionis.

Item nec locū habet p̃hibitio in causa restitutionis, cùm ecclesia recenter spoliata fuerit de aliqua libertate q̃ ei concessa fuerit tempore dedicationis, sicut habendi rationabile estoveriū in bosco patroni, sicut ad housbote & heybote et ad ardēdū, et hm̃oi. Itē habēdi cōmuniā pasturæ ratione t̃ræ datæ ecclesiæ in dotē: recēter dicitur, quia si nō est recenter, aliter erit. Itē nec locū habebit p̃hibitio, ubi quis negligens & juris sui contēptor tardiūs sibi p̃spexerit q̃m deberet, quia tūc primò tulit p̃hibitionē cùm p̃ventum esset ad sententiā diffinitivā ferendā, vel forte cùm lata esset sentētia, quia extūc nō esset qui sequeretur placitum, quia prius fuit placitū,[1] vel judex qui placitū teneret, q̃ post

[1] "placitatum," MS. Rawl. C. 160.

prejudices others besides the party who renounces. Likewise also in the same manner a prohibition will not have place, if a person has been made subject to another's jurisdiction of his own proper act on account of an appeal, as if he has been impleaded before an ecclesiastical judge not his own, and he has appealed to another judge not his own, if he has betaken himself to a royal prohibition by reason of a secular thing, which is sued for, he ought not to be listened to as far as regards his own person, although not so as regards the person of the king, as said above, because those whom he has once approved, he cannot afterwards disapprove.

6. He shall not have a prohibition concerning a recent spoliation.

Likewise a prohibition shall not have a place concerning a recent spoliation, as if a clerk has spoiled a clerk of tithes or of other things, concerning which the cognisance appertains to the ecclesiastical court, because concerning a restitution of this kind a prejudice is not created against the patrons as far as regards the right of advowson.

7. Likewise in a cause of restitution.

Likewise a prohibition has not a place in a cause of restitution, when a church has been recently spoiled of some franchise which has been granted to it at the time of its dedication, as of having reasonable estovers in the wood of the patron, as for *housebote* and *heybote* and for burning and such like. Likewise the liberty of having common of pasture by reason of land given to the church in dower: it is said recently, because if it be not recently, it will be otherwise. Likewise a prohibition will not have a place, where one has been negligent and has contemned his right, and has taken thought of his own interest more tardily than he ought, because he has then for the first time brought a prohibition, when the cause had arrived at the passing of a definitive sentence, or perhaps when a sentence has been passed, because from that time there would not be any one to prosecute the suit, because the suit was previously pleaded, nor a judge to entertain a plea, because after the prohibition it

ꝑhibitionē nō fuit secutū, qđ quidē querens ꝑpriæ poterit imputare negligentiæ, q̄ si tempestivè fecisset, non esset ei implacitandū,[1] et q̄ judicibus non sit negligentia querentis imputanda, habetis de term̃ S. H. anno regis H. x. in com̃ North. de Richardo Olive.

Cap. XI.

1. De judicibus, qui fraudulenter simul faciunt suas comminationes, ut facilius procedant ad excommunicationem.

f. 408 b.

Sunt revera judices qui, cùm citatus cōparuerit de re ad cognitionē suam non ꝑtinente, ut ꝑhibitionē evadere possint, facta editione sine scriptis, & denegato ei beneficio deliberationis, faciūt ei tres cōmonitiones, quamlibet post aliā primo die litis, & ubi satisfecerit eorū voluntaī, innodāt eum vinculo excom̄unicationis, et pendēte ꝑhibitione, cùm talis in hujusmodi excom̄unicatione ꝑstiterit ꝑ xl. dies, ut ꝑhibitionibus ꝑsecutionē evadāt, ad impetrationē eorundē judicū significat ordinarius regi, q̄ talis in excōmunicatione extitit per tantū tempus, & ꝑcurat captionem ꝑ hoc breve.

2. Breve de capiendo excommunicato domino regi per episcopum directum.

Excellentissimo dño suo H. Dei gratia &c. talis N. permissione divina Exoñ episcopus salutē in eo qui dat salutē regibus: serenitati regiæ præsentibus intimamus q̄ A. de N. ꝑpter ipsius contumaciam manifestam excom̄unicationis vinculo iñodatus ꝑ xl. dies & amplius in excom̄unicatione perseverans ecclesiasticæ negligit parere censuræ, claves ecclesiæ contemnendo. Quia vero regia majestas eorū solertiam reprimere con-

[1] "imputandum," MS. Rawl. C. 160.

has not been prosecuted, which indeed the complainant may impute to his own negligence, because if he had done it seasonably, fault would not have been imputed to him: and that the negligence of the complainant is not to be imputed to the judges, you have a case in St. Hilary's term in the tenth year of king Henry, in the county of Northampton, concerning Richard Olive.

Chapter XI.

1. Of judges, who fraudulently make their three monitions at once, that they may the more easily proceed to excommunication.

There are forsooth judges, who when the party cited has appeared before them in a matter not belonging to their cognisance, in order that they may evade a prohibition, upon the declaration of the ground of action having been made without writing; and having denied to him the benefit of deliberation, apply three admonitions to him one after the other on the first day of the suit, and when he has satisfied their will, entangle him with a chain of excommunication, and whilst a prohibition is pending, when the said party has persisted in this sort of excommunication during forty days, that they may evade a prosecution by prohibitions, the ordinary at their request signifies to the king, that the said party has remained in a state of excommunication during such a length of time, and he procures his seizure by a writ of this kind. f. 408 b.

2. A writ for seizing a party excommunicated, directed to the lord the king by the bishop.

To the most excellent lord Henry by the grace of God, &c., so-and-so N., by divine permission bishop of Exeter, greeting in him who gives health to kings. We intimate to your royal serenity by these presents that A. de N. having been fettered with a chain of excommunication during forty days on account of his manifest contumacy, and persevering further in his excommunication neglects to obey ecclesiastical censure, contemning the keys of the church. Because however your royal majesty has been accustomed to repress the subtlety of those,

suevit, qui ecclesiasticis præceptis obedire negligunt & mandatis, celsitudinis vestræ brachiū invocamus, rogantes attensiùs quatenus Dei et honoris ecclesiæ intuitu, q̄ minus valet ecclesia in hac p̄te, dignetur regia supplere majestas. Conservet vos Altissimus. Si autem sit qui conqueratur domino regi, q̄ ordinarius judex vel delegatus ita maliciosè procuraverit captionē quo minus sequi possit suam prohibitionē, statim fiat breve vicecom̄ de non capiendo talem in hac forma.

3. Si episcopus vel alius ordinarius fraudulenter procuraverit captionem.

Rex vic. salutem. Ostendit nobis A. q̄ cùm B. p̄sona de tali loco implacitasset eum in curia Christianitatis coram archidiacono tali, & officiali tali, de quodam prato, vel aliquod tale quòd est laicum feodū ipsius A. et idem A. tulisset eidem archidiacono et officiali suo breve nostrum de p̄hibitione ne placitum illud teneret, et eidem B. personæ aliud breve nostr̄ ne illud sequeretur, & postmodum resistere voluerit, tulisset breve nostrum de attachiando eos, ipse archidiaconus & officialis & persona, ut p̄cessum p̄hibitionis nostræ quam idem A. secutus est fraudulenter impedirent, suggesserunt tali episcopo q̄ idem A. excom̄unicatus fuit, & per xl. dies & amplius in excom̄unicatione illa contumaciter perseveravit, ad quorū fraudulentam suggestionem idem episcopus impetravit à nobis breve nostrum de capiendo ipsum A. p̄dicta occasione. Et quia nō debet fraus sua alicui patrociniari nec valere, tibi p̄cipimus q̄ ipsum A. occasione brevis nostri q̄ tibi venit de capiendo eum non capias, quo magis impediat̄ in causæ suæ prosecutione, & si occasione prædicta captus fuerit, ipsū sine dilatione facias deliberari. Et si p̄dictus archidiaconus officialis & p̄sona

who neglect to obey the precepts and the mandates of the church, we invoke the arm of your highness, requesting earnestly that from respect towards God and the honour of his church your royal majesty may deign to supply the strength which is wanting to the church in this behalf. May the Most High preserve you. But if there be any one who complains to the lord the king that the judge ordinary or delegate has so craftily procured his seizure in order that he may not be able to sue out a prohibition, let a writ issue forthwith to the viscount not to seize the said party in this form.

3. If a bishop or other ordinary has procured fraudulently the seizure of a party.

The king to the viscount greeting. A. has shown to us that when B. the parson of such a place has impleaded him in the court of Christianity before such an archdeacon and such an official concerning a certain meadow, or something of a kind which is a lay feud of the said A., and the said A. has served upon the said archdeacon and his official our writ of prohibition that he should not entertain that plea, and upon the said B. the parson another writ of ours that he should not prosecute that plea, and after he has wished to resist, has served upon them our writ to attach them, the said archdeacon and his official and the parson, that they might fraudulently impede the process of our prohibition, which the said A. has sued out, have suggested to the said bishop that the said A. had been excommunicated and had persisted for forty days or more contumaciously in that excommunication, upon which fraudulent suggestion the said bishop has sued out from us our writ to seize the said A. on the aforesaid occasion. And because a fraud ought never to benefit its author nor to prevail, we enjoin you that you do not seize the said A. on the occasion of our said writ, which has been sent to you to seize him in order to impede him in the prosecution of his suit, and if on the said occasion he has been seized, you shall cause him to be set free without delay. And if the aforesaid archdeacon and his

laicum feodū habuerint in balliva tua, & idē A. fecerit te securū de clamore suo ꝑsequendo, tūc illos ponas ꝑ vadiū et salvos plegios q̄ sint corā nobis tali loco, tali die, inde responsuri, et habeas ibi &c. T. &c.

4. Cum quis juste fuerit excommunicatus.

Cum autē quis meritis suis exigētib⁹ juste excom̄unicat⁹ fuerit, & ad mādatū ordinarii capt⁹ et imprisonat⁹, nō erit ꝑ dñm regē nec ꝑ aliū deliberād⁹, anteq̄m Deo et ecclesiæ satisfecerit cōpetēter. Sed si, cū hoc fecerit vel cautioñ p̄stiterit de parēdo juri et satisfaciēdo cōpetēter, et ordinarius ulterius ipsū maliciose in prisona detineri fecerit, extūc ꝑtinebit ad regē deliberatio ꝓpter maliciā, dū tamē ꝓcedat satisfactio vel sufficiēs cautio de satisfaciēdo (ut p̄dictū est) q̄d pri⁹ fieri nō deberet, nisi tūc demū cū ipse rex literas ordiñ de satisfactiōe reciperet, et in hoc casu fiat b̄re vic. in hac forma.

5. Cum juste excommunicatus paratus sit satisfacere f. 409. Deo et ecclesiæ, breve ad deliberandum eum, qui captus fuerit.

Rex vic. saluť. Ostēsū est nobis ex p̄te A. de N., qui meritis suis exigētib⁹, vel ꝓp̄ manifestā cōtumaciā suā excom̄unicat⁹ fuerit, et ad p̄ceptū nr̄m capt⁹ et in prisona nr̄a detētus, eo q̄ ꝑ xl. dies et amplius in excom̄unicatione illa contumaciter ꝑseveravit, donec Deo et ecclesiæ satisfecerit competēter, parat⁹ sit Deo et ecclesiæ satisfacere, talis ordinarius facit eum malitiosè in prisona detineri ad gravamē & damnū ipsius A. non modicū. Et quoniā in hac ꝑte ꝓpter malitiam ipsius ordinarii ad nos ꝑtinet deliberatio, tibi p̄cipim⁹ q̄, si idem A. eidem ordinario tali sufficientē fecerit

official and the parson have a lay fee within your bailiwick, and the said A. has given you security to prosecute his claim, then place them under bail and safe sureties that they should appear before us at such a place and on such a day to answer thereon, and bring with you this writ, &c. Witness &c.

4. When a person has been justly excommunicated.

But when a person upon his deserts requiring it has been justly excommunicated, and at the mandate of the ordinary has been seized and imprisoned, he will not have to be set free by the king or by any other person, before he has made competent satisfaction to God and to the church. But if, when he has done this or given security to obey the law and to make competent satisfaction, the ordinary shall maliciously cause him to be further detained in prison, thereupon it shall pertain to the king to set him free on account of the malice, provided however satisfaction or a sufficient security for satisfaction has preceded, as said above, which ought not however to take place until the time when the king himself has received the letters of the ordinary concerning the satisfaction, and in this case let a writ issue to the viscount in this form.

5. When a person justly excommunicated is prepared to satisfy God and the church, a writ to set free him who has been seized.

f. 409.

The king to the viscount greeting. It has been shown to us on the part of A. de N., who upon his deserts requiring it or on account of his manifest contumacy has been excommunicated and upon our precept has been seized and detained in our prison, inasmuch as he had contumaciously persevered forty days and more in that contumacy, until he should make competent satisfaction to God and to the church, that he is prepared to make satisfaction to God and to the church, and so-and-so the ordinary maliciously causes him to be detained in prison to the no slight grievance and damnification of the said A., and since on his behalf on account of the malice of the said ordinary his deliverance appertains to us, we enjoin you that if the said A. has given to

securitatē de parendo juri & satisfaciēdo cōpetenter Deo et ecclesiæ, tunc illū A. sine dilatione facias deliberari. Et si ordinarius hoc recusaverit, tūc tu ipse vice nr̃a capta securitate (ut p̃dictū est) illū sine dilatione deliberari facias. Cùm autē ad p̤hibitionē judices supersedere noluerint, nec ille qui p̤sequitur à p̤secutione desistere, attachientur omnes q̤ sint coram rege, vel justic. suis de banco, vel itinerantibus, p̤ tale br̃e, ad respondendū quare &c.

Cap. XII.

1. De judicibus attachiandis, si procedant contra prohibitionem.

Rex vic. salutē. Si A. fecerit te securū de clamore suo p̤sequendo, tunc pone p̤ vadiū et salvos plegios B. talē ordinariū q̤ sit corā nobis vel justic. nostris apud Westm̃. vel corā justic. nostris ad primā assisam &c. ostēsurus quare tenuerit placitū in curia Christianitatis de laico feodo ipsius A. in tali villa contra p̤hibitionē nr̃am, vel de advocatiōe talis ecclesiæ, vel de debitis & catallis q̃ nō sūt de testamēto vel matrimonio, et hujusmodi. Pone p̤ vadiū et salvos plegios E. q̤ tunc sit ibi ostēsurus, quare secutus est idē placitū in eadē curia Christianitatis contra p̤hibitionē nostram, et habeas ibi nomina plegiorū et hoc br̃e. Teste &c. Et ita fiāt brevia de attachiamēto, q̃ conveniant cū brevibus de p̤hibitione. Si autē fieri debeat attachiamentū de judicibus delegatis vel subdelegatis, tunc fiat breve in hac forma.

2. Breve de judicibus attachian-

Rex vic. salutē. Si A. fecerit te securū de clamore suo p̤sequendo, tunc pone p̤ vadiū et salvos plegios B., C., D. (nominibus p̤priis expressè, videlicet B

the said ordinary sufficient security as to obeying the law and making competent satisfaction to God and to the church, thou shouldst thereupon cause the said A. to be set free without delay. And if the ordinary has refused this, then do thou in our place having taken security as aforesaid cause him to be set free without delay. But if upon a prohibition the judges have been unwilling to supersede proceedings, or he who prosecutes has been unwilling to desist, then let them all be attached to appear before the king or his justiciaries at the bench or on their iter, by a writ of this kind, to answer wherefore, &c.

Chapter XII.

1. Of attaching the judges, if they proceed contrary to a prohibition.

The king to the viscount greeting. If A. has given you security for prosecuting his claim, then place under bail and safe sureties B. the ordinary of such a place, that he should be present before us or our justiciaries at Westminster or before our justiciaries at the first assise, &c. in order to show wherefore he has held a plea in the court of Christianity concerning a lay feud of the said A. in such a vill contrary to our prohibition, or concerning the advowson of such a church, or concerning debts and chattels which are not testamentary nor matrimonial and such like. Place under bail and safe sureties E. that he be present there in order to show wherefore he has prosecuted the said plea in the said court of Christianity against our prohibition, and produce the names of the sureties and this writ. Witness, &c. And let writs of attachment be issued, which are in accordance with the writs of prohibition. But if an attachment must be made of judges, delegate or sub-delegate, then let a writ issue in this form.

2. A writ for attaching judges, if

The king to the viscount greeting. If A. has given you security for prosecuting his claim, then place under bail and safe sureties B., C., D. (their proper names

dis, si autoritate literarum domini papæ.

episcopū, vel abbatem, vel priorem talem, C. archidiaconū talem, & D. officialem talem) quod sint coram nobis vel justic. nostris &c. ut supra, ostensuri, quare tenuerūt placitū in curia Christianitatis de laico feodo et hujusmodi &c. (ut supra) autoritate literarū dñi papæ, et hujusmodi, contra ꝑhibitionem nostram. Pone etiam per vadium & salvos plegios C. q̄ tunc sit ibi ostensurus, quare secutus est idem placitum in curia Christianitatis contra prohibitionem nostram, & habeas ibi &c. (ut supra). Et ita fiat attachiamentum, si judices et ille qui sequitur manentes fuerint in eodē cōm. Si autem in diversis, tunc fiant brevia diversa singulis vic. ꝑ se.

3. Item quod attachiet per meliores plegios.

Si autem ad diem non venerit, tunc aut vicecomes mandat q̄ attachiati sunt, in quo casu attachientur per meliores plegios & q̄ distringantur per omnes terras &c. quod sint ad alium diem, & observetur ordo attachiamentorum, sicut observatur in aliis actionibus ꝑsonalibus. Si autem mandaverit vicecomes q̄ clerici sint, & plegios invenire noluerint, nec laicum feodum habuerint per quod possint distringi, tunc mandetur ordinariis & episcopo quòd faciant eos venire, sicut
f. 409 b. alibi in actionibus personalibus observatur. Regulariter verum est,[1] q̄ judex clericus cognitionem non habet de laico feodo alicujus. Sed quid dicitur de tenementis quæ sunt in civitatibus & villis, quæ legari possunt sicut catalla sive tenementa sicut de perquisito, vel hæreditas descendens, an locum habeat prohibitio? videtur quòd non, quia de voluntate testatoris, qui legare potest hujusmodi de jure cōmuni, effecta sunt hujusmodi tenementa quasi catalla testatoris, & ideo non habet locum ꝑhibitio. Item de hoc quod dic. de

[1] "Regulariter verum est," down to "ab initio," is omitted in MS. Rawl. C. 160, and in MSS. Crewe, and Chertsey; also in MS. Harl. 653.

being expressed, to wit, B. the bishop or the abbot or the prior of such a place, C. the archdeacon of such a place, and D. the official of such a place), that they be present before us or our justiciaries &c. as above, in order to show wherefore they have entertained a suit in a court of Christianity concerning a lay feud and so on, &c. (as above) by authority of letters of the lord the pope and so on contrary to our prohibition. Place also under bail and safe sureties C. that he be there present in order to show wherefore he has prosecuted the said suit in the court of Christianity contrary to our prohibition, and produce there, &c. as above. And let the attachment be made in this manner, if the judges and he who prosecutes are resident in the same county. But if in different counties, then let different writs issue to each viscount separately.

by authority of letters of the lord the pope.

But if he has not come on the day, then either the viscount orders that they should be attached, in which case they shall be attached by better sureties and they shall be distrained by all their lands to be present on another day, and let the order of attachments be observed, as is observed in other personal actions. But if the viscount shall have sent word that they are clerks and are unwilling to find sureties, and have no lay feud by which they can be distrained, then let a mandate be sent to the ordinaries and to the bishop that they shall cause them to come as is elsewhere observed in personal actions. It is as a rule true, that a clerical judge has no cognisance of the lay feud of any one. But what is said of tenements which are in cities and in vills which may be bequeathed as chattels or tenements which have been purchased, or are a descending inheritance, whether a prohibition has a place. It seems that it has not so, because by the will of the testator, who can bequeath things of this kind under the common law, tenements of this sort are made as it were the chattels of the testator, and therefore a prohibition has no place. Likewise concerning

3. Likewise that he should attach by better sureties.

f. 409 b.

laico feodo talis, oportet quòd ille qui queritur, doceat laicum tenementum illud esse suum. Et unde si quis teneatur alicui domino suo ad redditum aliquem, tenens ꝑhibitionem non habebit, quia redditus erit ipsius domini, non tenentis. Si autem de hujusmodi non fiat prohibitio,[1] cùm sint quasi catalla vel pecunia promissa ob causam matrimonii, non habet locum ꝑhibitio, cùm illud quod principale est trahat ad se debitum & catalla, quasi accessoria testamento vel matrimonio. Item si fiat prohibitio ut de laico feodo, non valet de jure nec quantum ad petentem redditum, nec quantum ad tenentem tenementum de quo ꝓvenit, quia laicum feodum versum est in catallum & causa testatoris, ut cum legaretur ex tali causa, obtinuerit.[2]

Fleta vi. c. 37 § 3. Item incipit tale tenementum esse laicū feodum & non ante, quod non erit de decimis, cùm semel efficiantur laicū feodū, nunquam reincipient esse decimæ, & hæc vera sunt secundū Biastos:[3] sed contra de termino S. Michaelis, anno regis H. filii regis J. secundo incipiente tertio in coñ Kanc., de Matilda filia Simonis, quæ attachiata fuit quia secuta fuit placitū, & abbas Sancti Augustini & prior S. Trinitatis Cantuariensis, & prior Sancti Gregorii judices, quia tenuerint placita de quadam domo, quam Matilda petiit ex causa testamentaria in London. Et unde Simon filius Simonis questus fuit q laico feodo suo ibi defenderunt

[1] "Si autem de hujusmodi fiat "prohibitio, de hujusmodi catallis, "cum sint quasi catalla, videlicet "de pecunia promissa," MS. Rawl. C. 159. "Si autem de his catallis "fiat prohibitio, cum sunt quasi "catalla, vel de pecunia promissa," MS. Reg. 9, E. xv.

[2] "ex causa testamentaria, et "tunc legatarius ex tali causa ob-"tinuerit," Rawl. C. 160.

[3] "versus R. et alios," MS. Rawl. C. 159; "versus R. et alias," MS. Reg. 9, E. xv.; "secundum Regem "et alios," MS. Glastonbury necnon, MS. Hobhouse.

this which is said "concerning a lay feud of so and so," it is necessary that he who complains should show that the tenement in question is his own. And hence if any one is bound to his lord for a certain rent, the tenant shall not have a prohibition, because the rent belongs to the said lord, and not to the tenant. But if a prohibition issues[1] in such a case when there are as it were chattels or money promised because of matrimony, a prohibition has no place, since that which is the principal draws to itself the debt and chattels, as being as it were accessory to a testament or to a marriage. Likewise if a prohibition issues as concerning a lay feud, it does not avail of right, neither as regards the party claiming a rent, nor as regards the party holding the tenement from which it is derived, because the lay feud is converted into a chattel, and the cause of the testator, when it has been bequeathed on that ground, has prevailed. Likewise such a tenement begins to be a lay feud and not before, which will not be the case with tithes, which, when once they are made a lay feud, will never recommence to be tithes, and these are true against the king and other persons; but contrariwise in St. Michael's term in the third and fourth years of king Henry the son of John in the county of Kent concerning Matilda the daughter of Simon, who was attached because she prosecuted her suit, and the abbot of St. Augustine and the prior of Holy Trinity, Canterbury, and the prior of St. Gregory the judges, because they entertained pleas concerning a certain house, which Matilda claimed upon a testamentary cause in London. And whereof Simon[2] the son of Simon complained that they were

[1] I have followed the text of MS. Reg. 9, E. xv.

[2] The text is evidently corrupt after "Simon the son of Simon," down to the end of the Chapter, and it is omitted from most of the MSS.

omnes,[1] & adjudicatæ fuerunt leges sed remissæ, cùm ad petiť legari[2] & judices securitatem præstiterunt quòd ulterius non procedant;[3] sed quale remedium habebit legatarius in foro laicali. Et sciendum quod semper locum habet prohibitio, quousque discussum fuerit in curia regis utrum[4] legata fuerit vel non. Et[5] tunc primò procedant judices de licentia, quia ipsi non possunt estimare[6] ab initio.[7]

Cap. XIII.

1. Cum partes comparuerint in judicio.

Cum autem partes comparuerint in judicio, tam querens quàm ille de quo queritur, & judices vel quidam illorum, proponat querens intentionem suam in hunc modum. Ego A. conqueror de B. quòd me injuste vexavit & gravavit trahendo me in placitum in curia Christianitatis de laico feodo meo, scilicet tali, & exprimat qualitatem terræ, vel hujusmodi, vel alterius tenementi, vel si de debitis & catallis quæ non sunt &c. tunc exprimat cujusmodi debita & cujusmodi catalla de quibus implacitatus fuerit, & quòd hoc fecerit contra prohibitionem & unde damnum ad
f. 410. valentiam &c.

2. De probatione intentionis.

Item ad intentionem suam confirmandam & juvandam, proferat æditionem[8] ei factam in judicio & in scriptis redactam, si possit, & dicat quòd porrexit ei[9] prohibitionem domini regis tali loco, tali die in pleno

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[1] "quod laicum feudum suum "defenderunt omnes," MS. Reg. 9, E. xv.

[2] "adjudicati fuerunt plegii, sed "remissæ misericordiæ ad petiti-"onem legatarii," MS. Rawl. C. 159.

[3] "procederent," MS. id.

[4] "res legata," MS. id.; "res "fuerit legabilis," MS. Hobhouse.

[5] "et tunc convento rem lega-"bilem esse tunc primo procedant "judices," MS. Hobhouse, which introduces a text totally at variance with the received text of Bracton.

[6] "essoniare," MS. Rawl. C. 159.

[7] "ab initio," omitted MS. Reg. 9, E. xv.

[8] "editionem," MSS. Rawl. C. 159 and 160.

[9] "eis," MS. Reg. 9, E. xv.

all intermeddling with his lay feud, and sureties were adjudged, but the fines were remitted at the petition of the legatary, and the judges gave security that they would proceed no further, but what remedy shall the legatary have in a lay *forum*. And it is to be known that a prohibition has always place, until it has been decided in the court of the king whether there has been a legacy or not. And let the judges then proceed for the first time, because they cannot form an estimate from the commencement.

Chapter XIII.

1. When the parties have appeared in court.

But when the the parties have appeared in judgment as well the plaintiff as he of whom he complains, and the judges or some of them, let the plaintiff propound his declaration in this manner. I A. complain of B. that he has vexed me unjustly and has aggrieved me by drawing me into a plea in the court of Christianity concerning my lay feud, to wit, such a feud, and he describes the quality of the land or such like, or of another tenement; or if concerning debts and chattels which are not &c, then let him express what sort of debts and what sort of chattels they are, concerning which he has been impleaded, and that he has done this against a prohibition, and whence damages to the value &c. have resulted. f. 410.

2. Of the proof of the declaration.

Likewise to confirm and to assist his declaration let him produce the statement of the ground of action made to him in court and reduced into writing, if he can, and let him say that he exhibited to him the prohibition of the lord the king in such a place on such a day in a full

consistorio tali, & ipsi nihilominus processerunt ad prosecutionem ipsius de quo queritur, ita q̃ admiserunt p̃bationes testiū et hujusmodi, vel quia ipse querens noluit obtemperare judicatis, excom̃unicaverit eū non obstāte p̃hibitione sua, & inde statim p̃ducat sectam sufficientem, duos ad minus vel tres vel plures, si possit. Et si de veritate dubitetur, examinentur diligēter de die & loco et aliis circumstantiis, secūdum q̃ observatur de testibus p̃ducendis, qui si in examinatione facienda inventi fuerint discordes, perinde erit ac si nullam sectam p̃duxerit, & unde ad simplicem vocem querentis non habent judices necesse, nec pars de qua queritur, defendere se per legem. Sed quoniam deficere possit p̃batio, licet jus non deficiat, cùm tales fuerint absoluti forte pro defectu probationis, dicatur eis: quod quicquid actum fuerit, non procedant de aliquo placito, quod pertinet ad coronam et dignitatē regiam. Si autē in omnibus inveniantur cōcordes, audire debēt justic. respōsiones judicū et partis. Respondere itaq̃ poterunt multis modis, vel q̃ locū habere nō potuit p̃hibitio, quia res quæ acta est mere spiritualis est vel spiritualitati annexa, & hoc docere possunt per æditionē[1] factā, ut si causa fuerit testamentaria vel matrimonialis, in quo casu in nullo p̃sumptū est contra regiam dignitatem, et sic absolvi poterunt ab observatione judicii. Si vero per æditionem[2] vel p confessionem constiterit q̃ res, de qua actū fuerit, mere fuit temporalis, ita quòd cognitio pertinet ad regem, bene poterunt defendere contra querentem & sectam suam,

[1] "editionem," MSS. Rawl. C. 159 et 160.

[2] "editionem," MSS. eadem.

consistory of such a kind, and the said persons nevertheless proceeded to prosecute him, concerning which he complains, so that they admitted the proofs of witnesses and such like, or because he the plaintiff was unwilling to obey their adjudication, they excommunicated him notwithstanding his prohibition, and let him forthwith produce a sufficient sect, two at least or three or more, if he can. And if there be doubts as to the truth, let them be examined concerning the day and the place and the other circumstances, according to what is observed in producing witnesses, who if they be found in making the examination to be discordant, it will be the same as if he had produced no sect, and hence against the single voice of the complainant neither the judges of whom he complains, nor the party concerning whom he complains, will be under any necessity to defend themselves by their law. But since proof may be deficient, although right be not deficient, when such persons have been absolved for deficiency of proof, let it be said to them, that whatever may have been done, they are not to proceed in any plea, which pertains to the crown or to the royal dignity. But if the witnesses be found to agree in all things, the justiciaries ought to hear the answers of the judges and of the party. They may accordingly answer in many ways, either that the prohibition could not be applicable, because the matter which was in suit was purely spiritual or was annexed to the spirituality, and this they may show by the statement of the ground of action, as if the cause be testamentary or matrimonial, in which case nothing is presumed against the royal dignity, and so they may be absolved from any further observation of the judgment. But if it be established by the statement of the ground of action or by the confession of a party, that the matter which was in suit was purely temporal, so that the cognisance of it pertains to the king, they may well maintain against the plaintiff and his sect, that they have

q nunquam ꝑsecuti fuerint post prohibitionem, si quam inde habuerint, vel q nullam habuerint omninò prohibitionem.

3. De legis vadiatione, si defendat.

Et quo casu vadiet legem quilibet se xii. manu, qua vadiata & plegiis inventis de lege faciendā, dabitur eis dies ad legē faciendā, ad quam si voluerint, possunt se essoniare, & habebunt aliū diem ꝑ essoniatores suos. Et si ad diem sibi datū non venerint, nec se essoniaverint, ꝑ cōvictis habebūtur, judiciū habebūt, et dāna querenti restituent. Cùm autem cōparuerint et ꝑducant cōpurgatores suos, quāvis familiares et amicos, secundū q secta ꝑducta fuerit de familiaribus & amicis, facilius enim admittuntur purgatores[1] alicujus ad legē & defensionem ꝑpriam, qm recognitores ad recognitionē, et non est necesse q omnes sint ejusdem ordinis, conditionis, vel dignitatis, cujus est ille qui legem vadiat, sufficit enim si fideles sint & bonæ opinionis, ut si episcopus, abbas, vel prior ad legem teneatur, non oportebit q omnes compurgatores sint episcopi, abbates, vel priores, nec si clerici sint ordinati, milites, vel conjungati,[2] dū tamē alio modo sint idonei, ut ꝑdictū est.

4. Qualiter formantur verba legis.

Formantur autem verba legis secundū formam recordi sicut in omnibus aliis legibus faciendis observatur, in qua si quis eorum defecerit, si laicus fuerit, pro convicto habeatur de eo quod imponitur, & gaolæ cōmittatur sicut ꝑsumptor contra regiam dignitatē ac si crimē læsæ majestatis cōmisisset. Si autē clericus, f. 410. aliquando cū eo mitiùs agitur de gratia ob reverentiam ordinis clericalis. Si autē convicti, dāna restituent

[1] "compurgatores," MS. Rawl. C. 160.

[2] "conjugati," MS. id.

never proceeded after the prohibition, if they have had any, or that they have never had at all a prohibition.

3. Of the wager of law, if he defends.

And in which case he shall wage his law with the twelfth hand, which having been waged and sureties having been found for making his law, a day shall be given to him to make his law, at which, if they wish, they may essoin themselves, and they shall have another day through their essoiners. And if they have not come upon the day given to them, nor have essoined themselves, they shall be taken to be convicted, and shall have judgment against them, and shall make good to the complainant his damages. But when they have appeared and have produced their compurgators, although relatives and friends, according as a sect of relatives and friends may have been produced, for compurgators of any one for his own law and defence are more easily admitted, than recognisors for a recognition, and it is not necessary that all should be of the same order, condition or dignity, of which he is who wages his law, for it is sufficient if they be loyal and of good report, as if a bishop, or abbot, or prior is bound to prove his law, it will not be incumbent that all the compurgators should be bishops, or abbots, or priors, nor if they be ordained clerks or knights or married persons, provided however they be in other respects fit persons, as aforesaid.

4. In what manner the words of the law are formed.

But the words of the law are formed according to the form of the record, as is observed in making all other laws, in which if any one of them has failed, if he be a layman, let him be taken to be convicted of that which is imputed to him, and let him be committed to gaol as a presumer against the royal dignity, as if he had committed the crime of high treason. But if he be a clerk, he is sometimes dealt with more mildly of grace, f. 410. out of reverence for the clerical order. But if they be convicted, they shall make good to the complainant his

querenti, adhibita tamen taxatione aliquando debita secundum q justic. viderint justū.

5. Quod refert, quis eorum prius purgaverit.

Refert (secundū quosdā) quis prius se purgaverit, judex, vel ille de quo queritur. Dicunt quidā q si judex se purgaverit prius, unus vel plures, q ille qui secutus est non ꝑpter hoc liberabitur, & q quilibet in hoc casu defendat causam ꝑpriam, licet videatur prima facie q non est qui sequatur, cùm non sit qui teneat placitum (q non est verū secundū quosdam) sed vice versa, si ille qui sequi debeat se purgaverit, judices per hoc liberantur, cùm non sit qui teneat placitum, cùm non sit qui sequatur, quod non est in ipso casu, ubi quis sequi poterit de facto suo & voluntate: licet judex in probatione defecerit,[1] ille qui sequitur non est propter hoc condemnatus, nec eodem modo, si unus ex pluribus judicibus, quia quilibet in hoc casu defendet causam suam propriam secundum quod legitur ff. ad legem Julianam de adulterinis lege ult. Denunciasse,[2] C. Quare: ubi dicitur "quòd expecta-" bit mulier sententiam de adultero prolatam, qui si " absolutus fuerit, mulier ꝑ eum vincet, nec ultra " accusari possit.[3] Si autē condemnatus fuerit, mulier " non est condemnanda, sed aget causam suam, & " fortassis obtinere vel gratia vel justicia poterit vel " legis auxilio. Quid enim si adulter ab inimicis " oppressus sit, aut similibus argumentis testibusq̃

Dig. l. xlviii. tit. v. 17, § 6.

[1] "Item esto quod judex in pur-" gatione defecerit." MS. Reg, 9, E. xv.

[2] "secundum quod legitur ff. ad " legem in libro de adult., L. de-" nunciasse, ubi dicitur quod ex-" pectabit mulier, &c." MS. Reg. 9, E. xv.

[3] The Florentine text of the Digest ad legem Juliam de adulteriis, Lex 17, Denunciasse, § 6, Quæritur, is as follows: "Expectabit " igitur mulier sententiam de adul-" tero latam. Si absolutus fuerit, " mulier per eum vincet, nec ultra " accusari potest."

damages, a due taxation of them having been sometimes made according as the justiciaries have deemed just.

5. That it matters, who of them has first purged himself.

It matters (according to some) who has first purged himself, the judge or he by whom complaint is made. Some say that if the judge has first purged himself, one or more, that he who has prosecuted shall not on that account be set free, and that each in this case should defend his own cause, although at first sight it may seem that there is no one to prosecute, when there is no one to entertain a suit (which is not true according to some), but conversely, if he who ought to prosecute has purged himself, the judges are thereby set free, since there is no one to entertain a suit, when there is no one to sue, which is not the case where a person can prosecute of his own act and will: although the judge shall have failed in his proof, he who prosecutes is not on that account condemned, nor in the same way, if one out of several judges, because each in this case shall defend his own cause, according to what is read in the Digest upon the Julian law on adultery, the last law commencing with "Denunciasse," the sixth paragraph "Quæritur,"[1] where it is said, that the woman shall await the sentence pronounced upon the adulterer, who if he be acquitted, the woman through him shall prevail, nor can she be further accused. But if he be condemned, the woman is not to be condemned, but will plead her own cause, and perhaps will be able to prevail through favour or justice or with the help of the law. For what if the adulterer be oppressed by enemies or be aggrieved

[1] The translation follows the Florentine text of the digest, as Tottell's text is evidentlly corrupt.

" subornatis, apud præsidem gravatis,[1] quia aut voluit[2] " aut non potuit (mulier) provocare judicem religio- " sum. Mulier verò sortita pudicitiam suam defendat, " sed hoc antequàm fuerit condemnata,"[3] quod quidem (ut videtur) melius esset observare in omnibus casibus supradictis, ut si unus judex se purgaverit, q̃ hoc prodesse debet conjudicibus suis & parti. Si autē in purgatione defecerit, q̃ hoc aliis non noceat, quin se defendere possit & causam suam.

6. Itē respondere possunt judices, secundum q̃ superius in parte dictum est, quòd quamvis res de qua agitur temporalis sit, & cognitio pertineat ad forum seculare, ipse querens expressè renunciavit privilegia[4] fori in scriptura & regiæ p̃hibitioni, et q̃ conveniri possit ubicunq̃ creditor vellet, & in quocūq̃ foro. Et ideo q̃ ipse q̃rens audiri non debet propter renunciationē, ex quo gratis trahi voluit ad forum vetitū, et judicem non suum. Et cùm judices super hoc, & creditor, instrumentum p̃tulerunt de renunciatione, q̃ querens dedicere non possit, statim & ante omnia in judicio seculari compellatur ipse querens q̃ reddat illud q̃ debet, vel faciat q̃ convenit, et sic in misericordia p̃ injusta detētione versus suū creditorē, etiā sine alio brevi, sicut supradictū est, p̃pter dolū & malitiā suā, quia p̃ se reversus est ad judiciū regiū, cui prius renūciavit in ipsius regis p̃judicium. Et iis ita peractis,

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[1] " gravatus," MS. Rawl. C. 160.

[2] " noluit," MS. id.

[3] The Florentine text of the Digest continues as follows: " Si " condemnatus fuerit, mulier non " est condemnata, sed aget causam " suam: fortassis et obtinere, vel " gratia, vel justitia, vel legis auxi- " lio possit. Quid enim si adulter " inimicitiis oppressus est, vel falsis " argumentis, testibusque suborna- " tis apud præsidem gravatus: qui " aut noluit, aut non potuit provo- " care? Mulier vero judicem reli- " giosum sortita, pudicitiam suam " defendet? § 7. Sed si, antequam " condemnetur?"

[4] " privilegio," MS. Rawl. C. 160 et Reg. 9, E. xv.

by false arguments and suborned witnesses before the president, and he was either unable or unwilling to appeal? But the woman having a religious judge shall maintain her chastity, but this before she has been condemned [1]: which indeed, as it seems, it would be better to observe in all the aforesaid cases, as, if one judge has purged himself, this ought to benefit his fellow judges. But if he has failed in purging himself, this ought not to damage the others, so as to prevent them defending themselves and their cause.

6. Concerning the answers of the judges.

Likewise the judges may answer, according to what has been said above in part, that although the matter which is in action is temporal, and the cognisance belongs to a secular *forum*, the plaintiff himself has renounced the privilege of the *forum* in writing and the king's prohibition, and that he might be convened wherever his creditors wished and in any *forum* whatsoever. And accordingly that the plaintiff himself ought not to be heard on account of his renunciation, since he has been willing gratuitously to be drawn into a forbidden *forum*, and before a judge who is not his own. And when the judges on this matter and the creditor have produced an instrument of renunciation, which the plaintiff cannot gainsay, forthwith and before all things let the plaintiff himself be compelled in the secular court to restore that which he owes, or to do that which he has agreed to do, and so let him be amerced for his unjust detention against his creditor, even without another writ, as said above, on account of his deceit and malice, because of his own accord he has returned to the king's court, which he had formerly renounced to the prejudice of the king. And when these things have been thus concluded, then at

[1] The translator has of necessity not followed the text of Bracton, which is corrupt, but has adhered to it as far as he could reconcile it with the sense of the Florentine text of the Digest. The latter part of Bracton's text is unintelligible, but Tottell may have had authority for it in several MSS.

tunc demum ꝑcedatur in causa prohibitionis, et si convictum sit quod aliquando gratis ꝑcessit in foro ecclesiastico, tunc prosecutione & renunciatione concurrentibus aggravetur pœna propter multiplicem injuriam, & debitor in causa prohibitionis puniatur propter renunciationem cum pœna præcedenti propter injustam detentionem, & propter fraudem in veniendo contra factum suum proprium. Judices vero puniantur,[1] quia
f. 411. tenuerunt placitū in ꝑjudicium dñi regis, et similiter[2] creditor, quia debitorem traxit ad forum vetitum. Et secundum quod dicitur, quòd laicus non poterit renūciare foro seculari in ꝑjudicium regiæ dignitatis, eodē modo videtur ꝙ nec clericus, si velit in causa criminali vel alia cujus cognitio ꝑtineat ad ecclesiasticam dignitatem & ordinem clericalem, & est eadē fere ratio habita inde. Judex vero ecclesiastic[9] si judicaverit de laico feodo, non poterit sententiam demandare executioni, quia si illam demandaverit vicecomiti exequendam, non erit ei parendus.[3] Si autem illam legem per ipsum vel suos exequatur, locus erit novæ disseysinæ. Eodem modo videtur ꝙ si laicus cognoverit in causa criminali de clerico, ubi sequatur degradatio, si judicium faciat contra clericum, sive se gratis posuerit in inquisitionem sive non, ꝙ non valebit quod actum est: quia episcopus nunquam ad mandatum judicis secularis sine se[4] procedet ad degradationem. Igitur alia convictione opus erit in foro ecclesiastico, ut ipse cognoscat & judicet, qui poterit judiciū demandare executioni. Igitur quandocunq̃ petatur clericus in tali actione ab episcopo, erit illi deliberandus, quia non habebit rex prisonam de eo, quem judicare non poterit.

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[1] "Judices vero puniantur." These words and the subsequent text down to "delicti" are omitted in MS. Rawl. C. 160, and in several other MSS. but they occur in MS. Reg. 9. E. xv.

[2] The text of some MSS. breaks off here, as for instance MS. Harleian 653, and MS. Hobhouse.

[3] parendum MS. Reg. 9, E. xv.

[4] "sine rege," MS. id.

length let proceedings go on in a cause of prohibition, and if it be proved that he has gratuitously proceeded in the ecclesiastical court, then as the suit and the renunciation are concurrent, let the penalty be aggravated on account of the multiplied injury, and let the debtor in the cause of prohibition be punished on account of his renunciation with the penalty preceding on account of the unjust detention, and on account of the fraud in coming against his own act. But let the judges be punished, because they have entertained a suit to the f. 411. prejudice of the lord the king, and in like manner the creditor because he has drawn his debtor to a forbidden *forum*. And according to what is said that a laic cannot renounce the secular *forum* to the prejudice of the regal dignity, in the same manner it seems that neither can a cleric, if he wishes in a criminal cause or any other, in which the cognisance belongs to the ecclesiastical dignity and the clerical order, and there is almost the same reason had thereon. But an ecclesiastical judge, if he has judged concerning a lay feud, cannot command his sentence to execution, because if he has ordered the viscount to execute it, he will not obey him. But if he executes that law by himself or by his own people, it will be a case of novel disseysine. In the same manner it seems that if a laic has held cognisance in a criminal cause concerning a cleric, where degradation follows, if judgment has gone against the cleric, whether he puts himself gratuitously or not upon the inquest, that what is done will not avail, because the bishop will never at the mandate of a secular judge proceed without him to degradation. Therefore there will need be another conviction in an ecclesiastical court, that he himself may take cognisance and judge, who can order the judgment to be executed. Therefore whenever a cleric is claimed in such an action by a bishop, he will have to deliberate, because the king will not have a prison for him, whom he cannot judge.

In causis vero civilibus ubi non agitur ad degradationem, videtur quòd clerici se tueri non possunt, quin respondeant in foro seculari in placitis quæ pertinent ad coronam & dignitatem regis, quia rex poterit judiciū demandare executioni sine p̃judicio ecclesiasticæ dignitatis, maxime si voluerit, quod clericis in hujusmodi actionibus civilibus in foro seculari respondeatur, q̃ hujusmodi placita p̃tinent ad dignitatem et coronam regiam ratione rei et ratione dilecti.[1]

Cap. XIV.

1. Qualiter procedendum sit contra jurisdictionem alicujus judicis.

Superius dictum est qualiter revocatur jurisdictio, cùm quis tractus fuerit in placitum ad judicium vetitum, & ad judicem non suum, s. ad forum ecclesiasticum in placitis & actionibus quarū cognitio pertinet of[2] coronā & regiam dignitatem, p̃ exceptionē oppositam cōtra jurisdictionē. Nunc autē dicendum est qualiter excipiendum est cōtra jurisdictionem alicujus judicis, qui se facit judicem de placitis & actionibus quæ pertinent ad coronam et regiā dignitatē, cùm quis tractus fuerit in placitum coram eo. Et sciendum q̃ imprimis, ad hoc q̃ rata sint judicia, videre oportet an justic. warrantum habeat à rege q̃ judicare possit, quia si warrantum non habuerit, non valebit quod coram eo actum fuit, quasi coram non suo judice, quia primò legi debet breve originale, & postmodum breve per quod justic. constitutus est, & si nullum omnino habuerit, vel si habuerit non tamen ad manum, non erit ei parendum, nisi forte ita sit quòd breve originale de justiciaria sua faciat mentionem. Item nec est ei

[1] "delicti," MS. Reg. 9. E. xv. | [2] "ad," MS. Rawl. C. 160.

But in civil causes where proceedings are not taken for degradation, it seems that clerics cannot defend themselves from answering in a secular *forum* in pleas, which pertain to the crown and to the dignity of the king, because the king can order his judgment to be executed without any prejudice to the ecclesiastical dignity, especially if he has willed that an answer should be given to clerics in civil actions of this kind in a secular *forum*, that such suits pertain to the dignity and to the crown of the king by reason of the thing and by reason of the offence.

Chapter XIV.

1. How proceedings are to be taken against the jurisdiction of any judge.

It has been stated above how jurisdiction is revoked, when a person has been drawn into a plea in a forbidden court and before a judge not his own, to wit, into an ecclesiastical court in pleas and actions, whereof the cognisance belongs to the crown and to royal dignity, through an exception opposed to the jurisdiction. Now we must discuss in what way exception is to be taken to the jurisdiction of any judge, who makes himself judge upon pleas and actions which belong to the crown and to the royal dignity, when a person has been drawn into a plea before him. And it is to be known in the first place that, in order to secure that judgments should be ratified, it is incumbent to see whether the justiciary has a warrant from the king, so that he may judge, because if he have not a warrant, it will not avail that the action has been tried before him as being as it were not the judge of the party, because in the first place the original writ ought to be read, and afterwards the writ whereby he has been constituted a justiciary, and if he should have none at all, or if he have it not at hand, obedience will not be due to him, unless by chance it happens that the original writ makes mention of his justiciarship. Like-

parendum si contra jurisdictionem suam excipiatur, quòd fuit ob[1] eo subdelegatus, qui judicē dare non posset, ut si justic. sub se justic. fecerit ad totam causam, non magis quàm si procurator faceret procuratorem. Item nec erit ei obtemperandum cûm
f. 411 b. contra eum excipiatur, licet warrantum ostendat, ubi p ipsum qui se delegavit translata fuerit jurisdictio & cognitio ad aliū, quia si quis diversis tēporibus duos dederit judices, posteriorem dando videtur ꝑhibuisse priori. Itē nec est ei parendū si excipiatur, licet legatus[2] fuerit & warrantū habuerit, si sub p̃textu unius placiti velit cognoscere de aliis ad q̃ non extenditur sua jurisdictio, vel si cùm habeat jurisdictionē ad unū placitū, fines mandati excedat & jurisdictionē extendat ad alia, q̃ sequuntur assisam, post captionem assisæ, cùm sit functus officio suo sicut ad certificationē & convictionē, cum generalē non habeat jurisdictionē sibi delegatam, sicut habent justic. itinerantes in comitatu ad omnia placita, vel sicut justic. capitales. Itē excipitur contra jurisdictionē inferioris justiciarii, ubi p̃fertur jurisdictio jurisdictioni, ut si quis implacitatus fuerit de una et eadem re, ab uno vel diversis, in diversis curiis, sicut in curia dñi regis, curia baroñ, vel alterius alicujus inferioris, quo casu majus auditoriū præferri debet minori. Et si in majori curia ostenderit tenens q̃ de eadem re in minori curia implacitatus fuerit, ꝑhibebitur ex p̃te regis quòd de placito illo in inferiori curia non procedatur, et quamvis p̃cessum

[1] "ab," MS. Rawl. C. 160. | [2] "delegatus," MS. id.

wise obedience is not due to him if an exception be raised against his jurisdiction, that he has been sub-delegated by him who could not appoint a judge, as if a justiciary has appointed a justiciary subordinate to himself for the whole cause, no more than a procurator can appoint a procurator. Likewise obedience will not have to be paid to him when an exception is f. 411 b. raised against him, although he may show a warrant, when the jurisdiction and cognisance have been transferred by him, who has delegated him, to another, because if a person has at different times appointed two judges, by appointing a second he seems to have prohibited the former one. Likewise obedience is not to be shown to him, if he be excepted against, although he be delegated and have a warrant, if under the pretext of one plea he wishes to hold cognisance of others, to which his jurisdiction is not extended, or if when he has jurisdiction for one plea, he exceeds the limits of his mandate and extends his jurisdiction to other things, which follow the assise, after the holding of the assise, after he has discharged his duty as regards the certificate and conviction, when he has not a general jurisdiction delegated to him, as the justiciaries itinerant in a county to hear all pleas, or as chief justiciaries. Likewise an exception is raised against the jurisdiction of an inferior justiciary, where one jurisdiction is preferred to another jurisdiction, as if a person has been impleaded of one and the same thing by one or by different persons in different courts, as in the court of the lord the king, in the court of a baron, or some other inferior lord, in which case the superior tribunal ought to be preferred to the inferior. And if the tenant has shown in the superior court, that he has been impleaded concerning the same thing in an inferior court, a prohibition shall issue on the part of the king that proceedings shall not be taken on that plea in the inferior court, and although pro-

fuerit, quandoq̃ sive ꝑhibitio intervenerit sive nō, omnia quæ acta sunt in minori curia revocabuntur. Itē datur exceptio cōtra jurisdictionē ꝑpter privilegium implacitati, ut si quis respondere non debeat de aliquo placito nisi coram ipso rege vel capitali justic. suo, quale habent Hospitalarii, Tēplarii, & plures alii. Itē datur exceptio contra jurisdictionem ꝑpter privilegium proveniens ex concessa libertate, ut si universitas vel cōmunitas civitatis alicujus, sicut Londoñ, respondere non teneatur de aliquo placito extra civitatem, quale habent barones civitatis Londoñ, qui de nullo respondebunt extra civitatē, nisi tantum de tenuris & cōtractibus forinsecis. Itē exceptio datur contra jurisdictionē ꝑpter libertatē alicujus universitatis, q̃ de nullo placito respondebit nisi certo loco, qualem habēt baroñ de quinq̃ portibus qui non respondebūt de aliquo nisi apud Shypwey. Item datur exceptio contra jurisdictionem ꝑpter utilitatem alicujus universitatis, s. ne trahantur extra cōm̃ ad faciendā assisam novæ disseysinæ & mortis antecessoris. Itē datur exceptio contra jurisdictionē sicut in curia Baroñ, qui placitū de recto tenere nolunt vel nō possunt, vel si jurisdictionē remiserint in curia sua, & eam velint postmodū repetere. Item datur exceptio contra jurisdictionem ratione contractus, ratione delicti, & ratione renunciationis, de quibus superius dictum est.

Fleta, vi. c. 37 § 3.

Britton, vi. ch. iv. § 17.

ceedings have sometimes been taken, whether a prohibition has intervened or not, every thing which has taken place in the inferior court shall be revoked. Likewise an exception is allowed against the jurisdiction on account of the privilege of the party impleaded, as if a person ought not to answer upon any plea except before the king himself or his chief justiciary, such as the Hospitallers, the Templars, and several others. Likewise an exception is allowed against a jurisdiction on account of a privilege arising from the grant of a franchise, as if a corporation or a community of any city, such as London, is not bound to answer to any plea outside the city, such as the barons of the city of London have, who shall answer upon nothing outside the city, except only concerning foreign tenures and contracts. Likewise an exception is allowed against a jurisdiction on account of the franchise of a corporation, that it shall answer nowhere but in a certain place, such as the barons of the Cinque Ports have, who shall not answer upon any thing except at Shipwey. Likewise an exception is allowed against a jurisdiction on account of the interests of a certain corporation, that it should not be drawn out of the county to make an assise of novel disseysine or of mortdancester. Likewise an exception is allowed against a jurisdiction as in the court of barons, who are unwilling or unable to entertain a plea of right, or if they have renounced their jurisdiction in their own court, and wish afterwards to resume it. Likewise an exception is allowed against a jurisdiction by reason of a contract, by reason of the offence, or by reason of a renunciation, concerning which we have spoken above.

Cap. XV.

1. De exceptione contra personam justiciarii et de causa recusationis.

Dictum est de exceptionibus q̃ cōpetunt cōtra jurisdictionc̄: nunc videndum si sit aliqua q̃ competere possit contra p̄sonam justic. ut si aliqua ratione habeatur suspectus, timore, odio vel amore, & non video quare non debeat recusare,[1] quia si male judicaverit ex certa scientia, litem suam facit, & tenebitur ad restitutionē dānorū, cûm de hoc per superiorem fuerit convictus. Si autē per imperitiā, nec sic,[2] sed sum̄oniri poterit q̄ veniat & faciat recordum, ut ea q̃ correctione indigent, corrigantur, & in statū debitū reformentur. Melius tamen est (ut videtur) in tēpore occurrere, quā post cauem[3] vulneratā remediū q̃rere: ut suspectus amoveatur et ei substituatur nō suspectus, cū nihil detur gratius inimico quàm si detur ei quis adjudicand[2], quem damnificare intendit, et valde meticulosa res est sub justic. litigare suspecto, quia sæpius tristissimum sortitur eventum. Justiciarius potest recusari ex causa, causa vero recusationis unica est suspicio, quæ cōsurgit multis ex causis, s. si justic. sit consanguineus petentis, homo vel subditus, parens vel amicus, vel inimicus tenentis, affinis vel familiaris, vel com̄ensalis, consiliarius, vel narrator suus extiterit in causa illa, vel in alia, & hujusmodi.

f. 412.

Fleta, l. vi. c. 37.

2. De jurisdictione majorum judicum, sicut papæ.

In fine notandū de jurisdictione majorū & minorū, & imprimis sicut dominus papa in spiritualibus super omnibus habeat ordinariā jurisdictionē, ita habet rex in regno suo ordinariam in tēporalibus, & pares non habet, neq̃ superiores; & sunt qui sub eis ordinariam

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[1] "recusari," MS. Reg. 9. E. xv., et Harl. 653, et Rawl. C. 159.

[2] "si autem per imperitiam non "sit, sed summoniri poterit," MS. Rawl. C. 159. "si autem per imperitiam, nec sic, summoniri "poterit," MS. Harl. 653.

[3] "causam," Tottell's edition of 1569, MS. Reg. 9. E. xv.; MS. Harl. 653; Rawl. C. 159.

Chapter XV.

1. Of an exception against the person of the justiciary, and concerning the cause of the refusal.

We have spoken concerning exceptions which lie against the jurisdiction. Now we must see if there are any which lie against the person of the justiciary, as if he be for any reason regarded as suspected of fear or of hatred or of love, and I do not see wherefore he should not refuse, because if he has judged ill from certain knowledge he makes the suit his own, and he will be bound to make good the damages, when he shall have been convicted by a superior. But if from f. 412. inexperience, not so, but he may be summoned to come and make a record, that those things which require correction may be corrected, and be reformed into their due state. It is better however, as it seems, to oppose in time, than to seek a remedy after the cause has been wounded, in order that the suspected person may be removed and a person free from suspicion be substituted, since nothing more agreeable can be afforded to a private enemy than that there should be placed before him a person to be judged by him, whom he intends to damnify, and it is a very formidable thing to litigate before a suspected justiciary, because it often has a very sad ending. A justiciary may be refused for good cause, but the only cause for refusal is a suspicion, which arises from many causes, as if the judge be a blood relative of the plaintiff, his vassal or subject, his parent or friend, or an enemy of the tenant, his kinsman or a member of his household, or a table-companion, or he has been his counsellor or his pleader in that cause or in another, and in any such like capacity.

2. Concerning the jurisdiction of the superior judges, as of the pope.

Finally it is to be noted concerning the jurisdiction of superior and of inferior courts, and in the first place as the lord the pope has an ordinary jurisdiction over all things in spirituals, so the king has in his realm ordinary authority in temporal things, and has no peers, nor superiors; and there are persons who have ordinary

habent in multis, sed non ita meram sicut papa vel rex. Et pares esse poterunt illi qui inferiores sunt in jurisdictione sua multis rationibus, sed par in parem non habebit jurisdictionē nō magis quàm imperium, & multo fortius nec in superiorem.

3. Quod judex debet examinare et estimare, an sua sit jurisdictio.

Item sicut à papa poterit quis habere jurisdictionem delegatam in spiritualibus, ita poterit quis à rege in temporalibus, sicut justic. majores vel minores, vel alii qui sunt quasi justic. vz. quibus rex concessit libertates aliquas q̄ pertinent ad coronā & libertatē suam, & ideo quamvis in temporalibus sicut in spiritualibus debet rex estimare vel justic. sui, an sua sit jurisdictio an non, ut sciri possit utrum sum̄onitus venire debeat an non: tamen si judex ecclesiasticus falcem ponens in messem alienam aliquid præsumpserit cōtra coronā & dignitatem regiam, sicut de laico feodo vel de catallis, cùm ꝑhibitionē à rege susceperit, supersedere debet in omni casu, saltem donec constiterit in curia regia, ad quē ꝑtineat jurisdictio, quia si judex ecclesiasticus estimare posset an sua esset jurisdictio, in omni casu indifferenter ꝓcederet nō obstante regio[1] ꝑhibitione. Debet igitur vel omninò supersedere, vel cûm attachiatus fuerit, venire vel mittere, q̄ examinato placito in curia regia de consilio curiæ supersedeat, vel ꝓcedat, q̄ si non fecerit, pœna debita puniatur ut supra.

[1] "regia," MS. Rawl. C. 159.

jurisdiction under them, but not so absolute as the pope or the king. And they who are inferior in jurisdiction are peers in many ways, but a peer has not jurisdiction any more than empire over his peer, and much more not over a superior.

3. That a judge ought to examine and weigh, whether it be his jurisdiction.

Likewise as a person may have from the pope a delegated jurisdiction in spiritual matters, so he may have from the king a delegated jurisdiction in temporal matters, as superior and inferior justiciaries, or others who are as it were justiciaries, to wit, to whom the king has granted certain franchises which pertain to his crown and his franchise, and accordingly although in temporal matters as in spiritual matters the king or his justiciaries ought to weigh whether it be his jurisdiction or not, that it may be known whether a person summoned ought to appear or not; nevertheless if an ecclesiastical judge, putting his reaping hook into another's harvest, has presumed any thing against the crown and the king's dignity, as concerning a lay fee or chattels, when he has received a prohibition from the crown, he ought to supersede proceedings in every case, at least until it has been established in the court of the king to whom appertains the jurisdiction, because if the ecclesiastical judge could estimate whether it be his jurisdiction, he would in all cases proceed indifferently notwithstanding a royal prohibition. He ought therefore either altogether to supersede proceedings, or when he shall have been attached, to come or to send in order that, the plea having been examined in the king's court, he may upon the advice of the court supersede proceedings or may proceed, which if he fail to do, let him be punished with the due penalty as above.

Cap. XVI.

1. Quod quandoque mutatur jurisdictio in jurisdictionem, et quandoque de persona in personam, mutato f. 412 b. nomine rerum.

Mutatur quandòque jurisdictio de jurisdictione in jurisdictionem mutatis rerum nominibus, ut si de laico catallo fiat spirituale: ut cûm res fuerint decimatæ, fiunt de laico catalla[1] res spirituales, & sic mutatur jurisdictio secularis in spiritualem. Item è converso cûm decimæ venditæ fuerint, & ad alium translatæ, reincipiunt iterum esse laicum catallū. Eodem modo dici poterit de laico feodo, quòd mutato nomine in causa testamentaria fit laicum feodum quasi res spiritualis secundum quosdam, sicut videri poterit in domibus, ĩris, & tenẽtis legatis in civitatib⁹, burgis, & villis, & iterum redeunt in laicum feodū executo testamento. Eodem modo fieri deberet (ut videtur) de reb⁹ datis vel promissis ob causam matrimonii principaliter, et illud idem de rebus quæ accidūt de matrimonio, ut si pecunia p̃missa fuerit ob causam matrimonii. Et quia ejusdem juris, i. jurisdictionis esse deberet accessorium, cujus juris fuerit principale, & quāvis p̃dictorum p̃tineat cognitio ad judicem & forū ecclesiasticum, tamen ad p̃hibitionem regiam erit supersedendum. Sed revera locum habet p̃hibitio, quia si in burgo domus vel p̃dium legatum fuerit, in foro seculari terminabitur negotium, sicut de assignatione fieri oportet. Et si legatarius fuerit in seysina, habebit exceptionem contra hæredem & assisam novæ disseysinæ, si fuerit ejectus. Si autem extra seysinam, tunc habebit actionem in foro seculari per modum donationis versus omnes.

[1] "catallo," MS. Reg. 9. E. xv. et Rawl. C. 159.

Chapter XVI.

1. That the jurisdiction is sometimes changed from jurisdiction to jurisdiction, and sometimes from person to person, the name of the things having been changed. f. 412 b.

The jurisdiction is sometimes changed from jurisdiction to jurisdiction, the names of the things having been changed, as if from a lay chattel it has become a spiritual thing, as when things have been tithed, chattels become from a lay thing spiritual things, and so the secular jurisdiction is changed into a spiritual jurisdiction. Likewise conversely when tithes have been sold and transferred to another person, they recommence again to be a lay chattel. In the same way it may be said of a lay feud, that the name having been changed a lay feud in a testamentary cause becomes as it were a spiritual thing according to some persons, as may be seen in houses, lands and tenements bequeathed in cities, boroughs and townships, and they again return to the condition of a lay feud when the testament has been executed. In the same manner it ought to take place (as it seems) concerning things given or promised in view of matrimony principally, and the same concerning things which happen concerning matrimony, as if money has been promised in view of matrimony. And because the accessory ought to be under the same law, that is, under the same jurisdiction as the principal, and although the cognisance of the things aforesaid pertain to the ecclesiastical judge and *forum*, nevertheless proceedings must be superseded upon a prohibition from the king. But in truth a prohibition has a place, because if in a borough a house or land has been bequeathed, the business will be determined in a lay *forum*, as ought to be done in the case of an assignment. And if the legatee shall have been in seysine, he shall have an exception against the heir and an assise of novel disseysine, if he should be ejected. But if he be out of seysine, then he shall have an action in a lay *forum* after the manner of a donation against every body.

2. An privatus consensus mutare possit jurisdictionem.

Item videndum est, an privatorum consensus commutare possit regiam jurisdictionem in contractibus privatis, ut si quis sic consentiat ad alterius jurisdictionem ad vetitum examen convolando non obstante prohibitione, & verum est quod non, quia imponi non potest necessitas regi quòd suam jurisdictionem amittet, secundum quod superius dictum est in parte. Item nec mutari poterit per modum donationis sive per conventionem privatorum, licet ipse qui modū imposuerit sibi & suis p̃judicet, ut si privata p̃sona bastardo dederit & suis hæredibus, vel cui dare vel assignare voluerit, & si hæredes non habuerit reversura esset terra ad donatorem, sed quia donator modū adjicit, quia dare possit & assignare, valebit donatio & assignatio, q̃ aliâs non valerent. Eodē modo videtur, q̱ adjicere possit q̱ bastardus legare possit, sed per hujusmodi modum adjectum non mutatur jurisdictio regis, sed in curia regis terminabitur negotium, si legatarius fuerit extra seysinam, & p̱ tale breve. Præcipe &c. Et quæ ad talem reverti debent per modum donationis quam talis ei fecit, quod illam dare potuit, legare & assignare, quia eadem ratione qua bastardus per modum donationis dare potest & assignare, licet hæredes non habuerit: eadem ratione poterit legare, & ita quòd res data nec ad se, nec ad hæredes suos reverti possit, quia nulla ex hoc fit eis injuria, quia donator hoc voluit, & nihilominus tenentur hæredes factū illud warrantizare legatario, licet hæredes bastardi defecerint, & quod dicitur de bastardo idem observari poterit de legitimo, quia poterit in persona omnium lex imponi

2. Whether the consent of private persons can change the jurisdiction.

Likewise it is to be seen, whether the consent of private persons can change the king's jurisdiction in private contracts, as if a person should so consent to another's jurisdiction, by betaking himself to a forbidden inquiry notwithstanding a prohibition, and it is true that he cannot do so, because a necessity cannot be imposed upon the king that he should lose his jurisdiction, according to what has been said above in part. Likewise it cannot be changed by a mode of donation or by a convention between private persons, although the person who has imposed the mode should prejudice himself and his relatives, as if a private person has given to a bastard and to his heirs, or to whomsoever he has been pleased to give or to assign, and if he shall not have heirs the land will have to revert to the donor, but because the donor has added a mode, inasmuch as he can give and assign, the donation and assignment will avail, which otherwise would not be valid. In the same manner it seems that he may add that the bastard may bequeath, but the jurisdiction of the king is not changed by the addition of a mode of this kind, but the business shall be determined in the court of the king, if the legatee shall be out of seysine, and by a writ of this kind: Enjoin, &c. And which things ought to revert to so-and-so by the mode of donation, which so-and-so has made to him, that he may give, bequeath and assign the land, because for the same reason that a bastard may give and assign by a mode of donation, although he may not have heirs, for the same reason he may bequeath, and so that the thing given can not revert to himself nor to his heirs, because no injury is done thereby to them, because the donor has so willed, and nevertheless the heirs are bound to warrant that act to the legatee, although the heirs of the bastard have failed: and what is said concerning a bastard, the same may be observed concerning a legitimate person, because a law and a mode may be

& modus, sive donatorius liber sit vel servus, legitimus vel bastardus, quia oportet utrumquè, tam donatorē quam donatorium facere q convenit, ex quo uterq̃ ab initio hoc voluit.

3. Quod mutat jurisdictionem aliquando contractus, aliquando delictum.

Item mutat aliquando jurisdictionem contractus, & aliquando delictum. Ut si clericus contraxerit aliquo modo cum laico, conveniendus est ubi contraxerit, & aliquando ubi deliquit, dum tamen civiliter agatur & non ad pœnam corporalem infligendam, nisi degradatio vel alia capitis diminutio imponatur. Itē mutat aliquādo jurisdictionem, privilegiū ordinis clericalis, ut
f. 413. si clericus clericū cōvenerit in actione injuriæ, vel de rebus spiritualibus, sicut de decimis, vel aliis rebus mobilibus vel hujusmodi clericorū, sicut de catallis & debitis, ubi ad vetitum examen cōvolare non debent. Si autē de laico feodo agatur, aliud erit nisi fuerit dedicatum & Deo sacratū, & efficiatur res sacra, q quidē dici nō poterit de re in liberam & ppetuam eleemosynā datam.[1]

Cap. XVII.

1. De exceptionibus contra breve, et ubi eadem competere debet et ubi non.

Confirmata sic jurisdictione judicis, consequenter audiatur bf̃e per q expediri & exponi debet jus actionis, quo audito, perpendere poterit tenens an ex ipso brevi ei competere poterit exceptio, quia multæ sunt exceptiones quæ cōpetunt tenenti cōtra bf̃e. Oportet quidē q breve conveniat actioni, & q in suo casu impetratum sit, alioquin non valebit, verbi gratia. Si magnum bf̃e de recto patens impetratum fuerit

[1] "data," MS. Rawl. C. 159; MS. Reg. 9. E. xv.

imposed in the person of all, whether the donee be of free or of servile condition, legitimate or a bastard, because it is incumbent that both, as well the donor as the donee, should do what is suitable, since both from the beginning have desired this.

3. That a contract sometimes changes the jurisdiction, and sometimes an offence does so.

Likewise a contract sometimes changes the jurisdiction, and sometimes an offence does so. As if a cleric has contracted with a laic in any manner, he is to be convened where he has contracted, and sometimes where he has offended, provided however that the proceedings are civil, and not for the infliction of bodily punishment, unless degradation or some other loss of personal *status*. Likewise the privilege of the clerical order sometimes changes the jurisdiction, as if a cleric has convened a cleric in an action of injury, or concerning spiritual things, as concerning tithes, or other moveables or such like things of clerics, as concerning chattels and debts, when they ought not to betake themselves to a forbidden test. But if the proceeding be about a lay feud, it will be another thing, unless it has been dedicated and consecrated to God, and is rendered a sacred thing, which cannot be said concerning a thing given into free and perpetual alms. f. 413.

Chapter XVII.

1. Of an exception against the writ, and where it ought to be valid, and where not.

The jurisdiction of the judge having been thus confirmed, let there be read aloud in due course the writ, by which the right of action ought to be set forth and expounded, which having been read aloud the tenant may consider carefully, whether upon the writ itself an exception may be available, because there are many exceptions which may be available to the tenant against the writ. It is incumbent indeed that the writ should be suitable to the action, and that it should have been sued out in a proper case, otherwise it will not avail, for instance, if a great open writ of right has been sued

ubi parvū brē clausum impetrari deberet in dominicis dñi regis secundum consuetudinē manerii, & sic cadit breve, licet actio non cadat vel e contrariò, & nihilominus redire poterit ad aliud brē de recto q̄ competit casui, non obstante eo quod prius egit cum brevi quod non competiit, quod pro nullo computatur: ut de itinere W. de Ralegh [1] anno regni regis Henr̄ tricesimo in com̄ Not. Item si ordo brevium non observetur, ut si alicui plures competant actiones, et primò agere incepit per breve de recto super ipsa proprietate, vel super ipso jure & possessione simul, non poterit postmodum descendere ad inferiores actiones de ipsa possessione, quod si fecerit, cadit actio simul de ipsa possessione cum brevi. Sed licet processum sit per brē de recto quousquè visus petatur, ex penitentia poterit petens reverti ad inferiora placita sicut ad assisam novæ disseysinæ, mortis antecessoris, & alia plura: ut de termino Paschæ anno regni regis Henrici duodecimo in comitatu Berk. de Henrico de Siccario, quia ibi descensum est ad assisam novæ disseysinæ post breve de recto. De ordine brevium satis perpendi possit per ea quæ supradicta sunt. Item cadit breve si super modo & qualitate alicujus facti impetratum fuerit breve, ubi impetrari deberet super ipso facto, per quod terminari potest utrum tam ipsum factum quàm modus & qualitas, quia sēper debet prius termi-

[1] "ut de itinere R. de Turkeby "anno regni regis xxix. in com. "Notingh." MS. Rawl. C. 159; "de itinere Rog. de Thurkeby anno "regis Henrici xxix. in com. Not-"ingh." MS. Reg. 9, E. xv. See Introduction.

out, where a small close writ ought to be sued out in the demesnes of the lord the king according to the custom of the manor, and so the writ abates, although the action does not abate, or the converse, and nevertheless he will be able to return to another writ of right, which is applicable to the case, notwithstanding the fact that he has previously proceeded with a writ which was not applicable, which is reckoned for nothing, as in the iter of William de Ralegh[1] in the thirtieth year of the reign of king Henry in the county of Nottingham. Likewise if the order of the writs be not observed, as if any one is entitled to bring several actions, and he has commenced to proceed by a writ of right about the property itself, or about the right itself and the possession at the same time, he will not be able afterwards to descend to inferior actions concerning the possession itself, which if he should have so done, the action concerning the possession itself abates together with the writ. But although proceedings have been had through a writ of right until a view be claimed, the plaintiff may upon repentance return to inferior pleas as to an assise of novel disseysine, of mortdancester, and several others; as in Easter term of the twelfth year of the reign of king Henry, in the county of Berks, concerning Henricus de Siccario, because there a descent was made to an assise of novel disseysine after a writ of right. Concerning the order of writs it may be sufficiently understood through what has been said above. Likewise the writ abates, if a writ has been sued out concerning the mode and quality of any act, where it ought to have been sued out concerning the act itself, whereby it might have been determined whether as well the act itself as the mode and quality of it, because the principal ought always

[1] The reading of several MSS. which speak of the circuit of Roger de Turkeby (Thurkelby) instead of that of William de Ralegh, is probably the more accurate. See Introduction.

nari principale, cum quo terminari possit accessorium. Verbi gratia. Si quis disseysitus fuerit de aliquo tenemento cum violentia & armis, & impetraverit breve, Quare vi & armis, valere non debet breve, quia per hoc agitur de qualitate disseysinæ, & non de ipsa re, vz. de ipso teñto, ꝑ quo fiat violentia, nec acquirit querens aliquid de ipso teñto, sed si plura brevia impetrata fuerint de uno facto contra aliquem quod sub se contineat plures actiones, sicut plures disseysinas, & in uno brevi & in una actione terminari possit, si sic agatur, tamen propter hoc alia brevia non cadunt nec actiones, sed terminantur, & extunc erunt hujusmodi brevia supervacua. Et notandum quòd esse poterit exceptio peremptoria brevis, & non
f. 413 b. juris, quia quandôq̃ vertitur una actio in aliam ꝓpter privilegiū hæredis ad rem cõsequendam, et cadit omnino bñe super ipsa possessione, et retorquetur ad ipsum jus, sicut assisa mortis antecessoris nõ jacet inter cohæredes & ꝑsonas sanguine cõjunctas, sed breve de recto. Itẽ ꝑemptoria esse poterit, tam brevis quâm ipsius juris, ꝑ exceptionem rei judicatæ, recognitiones, et remissiones et quietū clamantię, & in omni casu ubi perimitur actio perimitur bñe, sed non e contrario, ut p̃dictū est.

2. Quæ sunt brevia originalia, et quæ sunt magistralia.

Breve quidẽ, cùm sit formatum ad similitudinem regulæ juris, quia breviter et paucis verbis intentionẽ ꝑferentis exponit et explanat, sicut regula juris, rem q̃ est breviter enarrat. Non tamẽ ita bñe esse debeat quin rationẽ et vim intentionis contineat. Et sunt q̃dam brevia formata super certis casibus, de cursu [1]

[1] "de cursu et de consilio totius "regni," MSS. Rawl. C. 159 and 160; "et de cursu et de communi "consilio totius regni," MS. Reg. 9, E. xv.

to be first determined, with which the accessory may be determined. For the sake of explanation. If any person shall have been disseysed from any tenement with violence and arms, and he has sued out a writ, *Quare vi et armis*, the writ ought not to avail, because through it proceedings are taken concerning the quality of the disseysine, and not concerning the thing itself, that is, concerning the tenement, for which violence has been done, nor does the plaintiff acquire any thing of the tenement itself; but if several writs have been sued concerning one act against any one, which contains under it several actions, as several disseysines, and may be determined in one writ and in one action, if proceedings are so had, nevertheless on account of that action the other writs and actions do not abate, but are determined, and thenceforth the other writs will be superfluous. And it is to be noted that there may be a peremptory exception to a writ and not to the right, because sometimes one action is turned into f. 413 b. another on account of the privilege of an heir to obtain the thing, and the writ upon the possession itself abates altogether, and recourse is had to the right itself, as an assise of mortdancester does not lie between coheirs and persons conjoint in blood, but a writ of right. Likewise the exception may be peremptory against as well the writ as the right itself, through the exception of a judgment already given, recognitions and remissions and quitclaims, and in every case where the action is perempted the writ is perempted, but not the converse, as said above.

2. What writs are original and what are magisterial.

A writ indeed, when it has been drawn up after the likeness of a rule of law, because it expounds and explains the declaration of the party producing it, just as a rule of law, narrates briefly the thing which is. It ought not however to be so brief as not to contain the reason and force of the declaration. And there are some writs drawn up on certain cases, granted and

et de cōmuni cōsilio totius regni concessa et approbata, q̃ quidē nullatenus mutari poterint absq̃ consensu et voluntate eorum. Sunt etiam brevia ex eis sequentia q̃ dicuntur judicialia, & sæpius variantur secundū varietatē placitorū ꝑponentis et respondentis, petentis, et excipientis, secundū varietatē responsionū. Sunt etiam q̃dam quæ dicuntur magistralia et sæpius variantur secundum varietatē casuū et querelarum, et quædam sunt ꝑsonalia quædā mixta secundum qđ sunt actiones diversæ et variæ, quia tot erunt formulæ brevium quot sunt genera actionum, quia non potest quis sine brevi agere, cùm non teneatur alius sine brevi respondere nisi gratis voluerit, et ex hoc ei nō injuriatur, cûm scienti et volenti non fit injuria. Item cùm de eadem re alicui plures competant actiones, eodem modo competunt ei plura brevia, sed uno oportet experiri sicut una actione, ordine tamen (ut convenit) observato. Breve quidem domini regis in se nullam continere debet falsitatem. Item nullum errorē. Apparere etiā debet in prima sui figura[1] non vitiosum, maxime si fuerit patens sive apertum, quia originalium quædam aperta, quædam clausa, et sive aperta sive clausa apparere debent non abrasa, nō obolita,[2] et si inveniatur abrasio, tunc refert quo loco, et à quo, et quādo. Quo loco, utrū vz. in narratione facti vel juris, si autē in narratione facti, cadit bf̃e quasi suspectum, facta enim et nomina mutari nō debēt, sed jure[3] ubiq̃ scribi possunt. Item à quo, utrum vz. per ipsum cancellarium vel ausu temerario per alium, sicut per

Britton l. ii. ch. xvii. § 2.

[1] "Item nullum errorem apparere "debet in prima sui figura, maxime "si fuerit patens sive apertum," MS. Rawl. C. 159, Reg. 9 E. xv.

[2] "abolita," MSS. eadem.

[3] "jura," MSS. eadem.

approved of the course and of the common counsel of the whole kingdom, which cannot be changed in any manner without their consent and assent. There are other writs following out of them, which are called judicial, and are repeatedly varied according to the variety of the pleas, of the proponent and of the respondent, of the claimant and of the exceptor, according to the variety of the answers. There are also certain writs which are called magisterial, and are often varied according to the variety of the cases and complaints, and some are personal and some are mixed according as the actions are diverse and varied, because there will be as many formulas of writs as there are kinds of actions, because a person cannot bring an action without a writ, since another person is not obliged to make answer to him without a writ, unless he has gratuitously been willing to do so, and thereupon no injury is done to him, as to a person who is knowing and willing no injury is done. Likewise when a person is entitled to bring various actions on the same subject, in the same way he is entitled to several writs, but he ought to feel his way with one writ as with one action, due order however being suitably observed. A writ indeed of the lord the king ought not to contain in itself any falseness. Likewise no error. It ought also to appear in its first outline not defective, especially if it be patent or open, because of original writs some are open, some are close, and whether they are open or close, they ought to appear free from erasure or from obliteration; and if an erasure be found, then it is of importance in what place and by whom and at what time. In what place? whether for instance in a count of fact or of law, but if in a count of fact the writ abates as open to suspicion, for facts and names ought not to be changed, but law may be written anywhere. Likewise by whom, whether for instance, by the chancellor himself, or with rash audacity by another person, as by the clerk of a justiciary or of the viscount at the

clericum justic. vel vic. ad ꝓcurationem alicuj⁹ partis, ubi omnes tam agẽtes quâm cõsentientes de omnibus bonis suis sunt in misericordia et voluntate dñi regis, et ipsi tanquã falsarii nihilominus puniantur. Et quòd tales argui possunt de falsitate: ꝓbatur de terñ S. M. anno regni regis H. quarto incipiente quinto in comitatu Hereford de Radulpho Harang. Item quando, videlicet utrum hoc fiat antequam breve fuerit in curia recitatum & publicatum vel post, et sic breve suspectum & cadit, si hoc fuerit à petente impetratum. Item cadit breve, si in se contineat talem falsitatem, q̃ signum appositum sit adulterinum ipsius dñi regis, sive omninò falsum sive verũ, falso tamen appositum per industriã falsariorum. Et quo casu committitur crimen læsæ majestatis, & puniuntur tales ultimo supplicio si laici fuerint, si vero clerici, pœnam degradationis sustinebunt cum perpetua infamia, nisi warrantũ habuerint: secundũ q̃ inveniri poterit in itinere M. de P. in coñ Eborũ anno regis H. decimo de Rogero de Fanborne et Agnete uxore ejus, qui protulerũt quoddam breve de recto, cui signum verum appensum fuit falso brevi et per industriam falsarii, & ubi ipse Rogerus suspensus fuit, quia warrantum nõ habuit, sed uxor sua liberata, sive conscia sceleris sive non, quia fuit sub virga viri sui. Item cadit breve simul cum actione ad damnũ ipsius impetrantis, q̃ impetratũ fuit per falsam suggestionẽ vel per veri suppressionẽ. Per falsi suggestionem: ut si dicat quis se esse hæredem cum non sit: ut de terñ S. Trinitatis anno regni regis H. quarto in coñ Midd̃ de Hamond[1] de Brood. Idem erit, si quis dicat se tenere in feodo, cùm nõ teneat

f. 414.

[1] "de Hamone de Brood," MS. Rawl. C. 160; Hamone Broud, Reg. 9 E. xv.

procurement of any party, in which case all persons as well the agents as the parties consenting are at the mercy and pleasure of the lord the king for all their goods, and they may be themselves punished as falsifiers. And that such persons may be convicted of falsification is proved in Michaelmas term in the fourth and fifth year of the reign of king Henry, in the county of Hereford, concerning Ralph Harang. Likewise at what time? to wit, whether this was done before the writ was read and published in court, or afterwards, and so the writ is suspicious and abates, if it has been sued out by the plaintiff. Likewise, the writ abates, if it contains such a falsification, that the seal affixed to it is a counterfeit of the seal of the lord the king, whether altogether false, or true and fraudulently attached to it by the contrivance of falsifiers. And in which case the crime of high treason is committed, and such persons are punished with extreme severity, if they are laics, but if they are clerics, they shall undergo the punishment of degradation with perpetual infamy, unless they shall have a warranty: f. 414. according to what may be found in the iter of Martin de Pateshull in the county of York in the tenth year of king Henry, concerning Fanborne and Agnes his wife, who produced a certain writ of right, to which a true seal was attached to a false writ and through the contrivance of a falsifier, and where Roger himself was hanged because he had no warrantor, but his wife was set free, whether privy to the crime or not, because she was under the rod of her husband. Likewise the writ abates together with the action to the damage of the party suing it out because it has been sued out through a false suggestion or a suppression of the truth. By the suggestion of a falsehood, as if a person should say that he was the heir, when he was not so, as in Holy Trinity term in the fourth year of the reign of king Henry, in the county of Middlesex, concerning Hamo de Brood. The same thing will happen, if a person should say that

nisi ad terminū et hujusmodi, vel si mulier cùm dotē petierit ꝑtem dotis habuerit, cùm dicat se nihil habere, & sic breve de dote impetravit & hujusmodi. Itē ꝑ veri suppressionē, ut si quis dicat se ingressū habere per aliū quàm per illum, per q̃m ingressus fuerit. Item cui[1] talis dimiserit qui nunquam dimisit, eo q̄ inde nullam seysinam habuit, vel si aliquem gradū impetrando omiserit. Et de hac materia inveniri poterit inter placita quæ sequuntur regē Henr̃ anno tricesimo primo inter Michaelem abbatem Glastoñ et Rogerū episcopū Bathoñ. Et unde idem abbas dixit regi,[1] q̄ episcopus non habuit ingressum nisi per episcopū J. cui prior Eustachius terras illas dimisit, qui nunquam inde seysinam habuit. Et illud idē dici poterit in brevi de warrantia chartæ, ubi impetrator impetrando dixerit se tenere terram, quam non tenuerat, & sic impetraverat, quo expresso non impetrasset et hujusmodi. Et cûm br̃e ita in se fuerit vitiosum in aliqua parte, in nulla ꝑte valebit quantū ad unam actionem, secus esset si plures sint ibi actiones ratione plurium tenentiū. Et si unus petat per unum breve feodū unius militis in una villa et versus alium in eodem brevi feodū alterius militis in eadē villa vel in diversis, quamvis cadat br̃e de feodo unius militis, nihilominus stabit de feodo alterius militis versus eundē, quia ibi sunt diversæ actiones ꝑpter diversitates tenementorum quāvis br̃e unicū. Item eodem modo erunt actiones plures ratione diversarum ꝑsonarum & rerum, ubi plures sunt tenentes. Et de hac materia inveniri

Cf. f. 427 b.

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[1] "quod talis," MS. Rawl. C. 160.

[2] "regi," omitted MS. Rawl. C. 160.

he held in fee, when he only held for a term and such like, or if a woman when she claims dower has had a part of her dower, when she says that she has had nothing, and so she has obtained a writ of dower and such like. Likewise through a suppression of the truth, as if a person should say, that he has had entry through another person than him, through whom he has had entry. Likewise that so-and-so has demised, who has never demised, inasmuch as he has never had seysine thereof, or if he has omitted any step in suing out. And on this subject there will be found something amongst the pleas which follow the king in the thirty-first year of [king] Henry, between Michael abbot of Glastonbury and Roger bishop of Bath. And whereon the said abbot said to the king, that the bishop had had no entry except through bishop J. to whom the prior Eustachius demised those lands, who never had seysine of them. And the same thing may be said in a writ concerning the warranty of a charter, where the suer out in suing out said that he held the land which he had not held, and so he had sued out [the writ], which if it had been expressed, he would not have sued it out, and such like. And when the writ is thus faulty in itself in any part, it will be valid in no part as regards one action: it would be otherwise if there were several actions there by reason of several tenants. And if one person claims by one writ the feud of one knight in one vill and against another party in the same writ a feud of another knight in the same vill or in divers, although the writ may abate concerning the feud of the one knight, nevertheless it shall stand concerning the feud of another knight against the same, because there are divers actions on account of the diversity of tenements, although only one writ. Likewise in the same manner there will be several actions by reason of divers persons and things, where there are several tenants. And on this subject there will be found a

poterit de terñ S. Hilarii anno regni regis H. octavo in coñ Hereford, de Richardo filio Godfrey. Et sic vel cadit breve omninò, vel stabit quantum ad quosdam, et cadet quantum ad alios. Item cadit breve quantum ad mortē unius partis sive petentis sive tenētis, simul cum actione. Item si plures sint petentes vel plures tenentes qui sunt cohæredes et participes et unū jus habentes, morte unius vel plurium cadit breve, sed non actio, quia quandoque cadit breve, sed non actio, et quādoq̃ stat bře simul cū actione sed corrigitur ꝑpter errorē vel defectū, quādoq̃ cadit bře simul cū actione, quia ubi cadit actio ibi cadit bře. Itē quādoq̃ tenet bře et differtur actio, quia ubicūq̃ tenet actio ibi & bře, licet corrigaī quādoq̃ ꝑpter errorē. Itē quandoq̃ cadit bře sed mutaī petitio in aliā actionē de eadē re, sed ꝑ aliud bře, secūdū qđ superi[2] diciī in parte super possessione & ꝑprietate. De hoc autem
f. 414 b. qđ diciī, q̃ quādoq̃ stat breve simul cum actione, sed corrigatur ꝑpter errorē vel defectū de errore impetrantis, videndū est & sciendū quod error multiplex esse poterit, s. in personis, & in nominibus & cognominibus personarum. Item in rebus & in locis, sicut in comitatu & villis & eorum nominibus, secundum quod
Supra f. 188 b. superius dicitur in tractatu de seysina.[1] Sed esto q̃ quis sum̄oneatur in alio coñ quàm in quo res est de qua agitur, & ubi sum̄onitus nullū tenementum habet nec feodum, in actione reali, licet vicec. p̃sit duobus coñ, sicut dici poterit de vic. Essex & Hereford et

[1] "de disseisinis," MSS. Rawl. C. 159 and 160, Reg. 9 E. xv.

case in St. Hilary's term in the eighth year of the reign of king Henry, in the county of Hereford, concerning Richard the son of Godfrey. And so either the writ abates altogether or it will stand as far as regards some, and it will abate as far as regards others. Likewise the writ abates as regards the death of one of the parties, whether it be the plaintiff or the defendant, together with the action. Likewise if there be several claimants or several tenants who are coheirs and coparceners and having one right, by the death of one or more the writ abates, but not the action, because sometimes the writ abates but not the action, and sometimes the writ stands together with the action, but it is corrected on account of an error or defect; sometimes the writ abates together with the action, for where the action abates, there the writ abates. Likewise sometimes the writ holds and the action is deferred, for wherever the action holds there also the writ holds, although it be corrected sometimes on account of an error. Likewise sometimes the writ abates but the claim is changed into another action concerning the same thing, but through another writ, according to what is said above in part upon possession and property. But concerning this which is said, that the writ sometimes stands together with the action, f. 414 b.
but is corrected on account of an error or defect from the error of the party suing it out, we must see and know that error may be manifold, to wit, in the persons and in the names and in the surnames of the persons. Likewise in the things and the places, as in the county and the vills and their names, according to what has been said above in the treatise concerning disseysines. But let it be, that a person is summoned in a county other than that in which the thing is, which is the subject of an action, and where the party summoned has no tenement nor feud, in a real action, although the viscount presides over two counties, as may be said

nominatur tantū in brevi vic. Essex, & res petita fuerit in comitatu Hereford, cadit bre. Si autē uterq̃ com̃ nominetur, valet. Si autē actio fuerit personalis, videtur tamen adhuc q̃ valere debeat, licet sum̃onitus tram non habeat in com̃ expresso. Item cadit bre, si impetratū fuerit cōtra jus et regni consuetudinē & maxime cōtra chartam libertatis, sicut bre q̃ vocatur (præcipe in capite)[1] per quod liber homo posset curiam amittere. Si autem præter jus fuerit impetratum, dum tamen fuit rationi consonum et non juri cōtrarium, erit sustinendū, dum tamen à rege concessū et à consilio suo approbatū. Sed esse debet personale, sed non debet concedi nisi de gratia speciali, nec refert utrū magnates expresse non p̃buerint assensum, dum tamen expresse non dissentiverint, nec ostensa ratione sufficienti quare valere nō debeat, p̃tinet enim ad regem ad quamlibet injuriam cōpescendū[2] remedium competens adhibere, brevia tamen com̃unia inter omnes p̃ jure generaliter debēt observari, cùm sint originalia & actionibus originem p̃stent. Item cadit breve si tenens minus teneat quàm petens petat, secus tamen si plus teneat. Item cadit breve si tempore impetrationis ⌜nulla subfuit causa impetrandi, quia tempore date impetrationis nulla petenti cōpetiit actio nec causa petendi. Item nec causa cōquerēdi, quia tūc

Supra, f. 105 b.

[1] "quod vocatur præcipe," MS. Rawl. C. 160.

[2] "compescendam" is no doubt the proper reading. The contracted form of "compescend̃," which occurs in MSS. Rawl. C. 159 and 160, has been misread by the scribe of the MS. which Tottell's editor has followed.

of the viscount of Essex and of Hereford, and the viscount of Essex is only named in the writ, and the thing claimed is in the county of Hereford, the writ abates. But if both counties are named, it is valid. But if the action should be personal, it seems however that it ought to be valid, although the party summoned has no land in the county expressed. Likewise the writ abates, if it has been sued out contrary to the right and custom of the realm, and especially contrary to the charter of liberty, as the writ which is called *Præcipe in capite*, through which a free person may lose his court.[1] But if it be sued out beyond right, provided it be consonant to reason and not contrary to right, it will have to be supported, provided that it has been granted by the king and approved by his council. But it ought to be personal, and it ought not to be granted except of special grace, nor does it matter whether the magnates have expressly given their assent, provided however that they have not expressly dissented from it, and no sufficient reason having been shown wherefore it ought not to be valid, for it appertains to the king to apply a suitable remedy to restrain every injury whatsoever, but common writs ought to observed generally amongst all persons as of right, since they are original and afford an origin to actions. Likewise a writ abates, if the tenant holds less than the claimant seeks, otherwise however if he holds more. Likewise a writ abates if at the time of suing it out there was no substantial cause for suing it out, because at the time of the writ being granted the claimant was not entitled to bring an action nor was there any cause of claim. Likewise no cause of

[1] Under the 34th clause of the Magna Charta of king John it was provided: "Breve quod vocatur "'Præcipe' de cætero non fiat alicui "de aliquo tenemento, unde liber "homo amittere potest curiam "suam." Stubbs' Select Charters, p. 202, and Taswell-Langmead's Constitutional History, p. 118.

nulla fuit disseysina nec aliqua injuria. Item nec valet breve, quia ille, qui nunc tenet, tẽpore impetrationis non fuit in seysina de tota re petita vel aliqua ejus ꝑte, licet statim visum petat cū nihil teneat vel nō totum, tamen ꝑpter hoc nō amittet exceptionē suam contra brĕe. Et hæc vera sunt, licet post impetrationem incipiat tenens totum possidere, quāvis videatur q̃ actio pervenerit in eum casum à quo incipere poterit. Itē cadit brĕe si cui plures cōpetant actiones de eadē re & plura brevia, & una actione agere incipiat facta electione & per unum brĕe, si pendente actione in brevi illo ad aliam actionem convolaverit, cadit brĕe posteriùs impetratū, quia à prima non est recessū: ut de placitis q̃ sequuntur regem anno tricesimo primo, in loquela inter Petrū de Solandia[1] & abbatem de Ryvall in forgiis de foresta de Glaxtoll,[2] & hoc verū est si se tẽpestive retraxerit ante judiciū, post judiciū vero non poterit.[3] Sed q̃ro an quis poterit retrahere se à quibusdam articulis brevis & de quibusdā non? Item videndum utrū ita sint connexi, q̃ un⁹ sine alio terminari possit vel nō, & secūdū hoc ꝑcedatur vel nō. Item cadit breve mortuo eo qui impetravit, vel deposito, si forte episcopus fuerit, abbas vel prior vel hujusmodi, sed non è contrariò, si episcopus, abbas vel prior tenentes fuerint, quia dependet actio cum brevi donec fuerit alius ei substitutus, maximè si actio fuerit civilis et non pœnalis. Si autem civilis sit et pœnalis, durabit actio quantū ad pœnā & quantū ad

Supra, f. 114.

f. 415.

[1] "Petrum de Sabaudia," MS. Reg. 9, E. xv.

[2] "de foresta de Glan," Reg. 9, E. xv.

[3] "The same case seems to be cited in the treatise De Actionibus, supra fol. 114, where the parties are described as Abbas de Ryvall, and Petrus de Sabaudia; see Introduction.

complaining, because at that time there was no disseysine nor other injury. Likewise the writ is not valid, because he, who now is tenant, was not in seysine of the whole thing claimed, or of any part of it, at the time of the suing out, although he should immediately claim a view, when he holds nothing or not the whole thing, nevertheless on that account he shall not lose his exception against the writ. And these things are true, although after the suing out the tenant should begin to possess the whole, although it may appear that the action has arrived at a stage from which it may commence. Likewise the writ abates, if any person is entitled to several actions concerning the same thing and to several writs, and he begins to proceed by one action having made a choice and through one writ, if pending the action upon that writ he has betaken himself to another action, the writ last sued out abates, because he has not withdrawn from the first, as in the pleas which follow the king in the thirty-first year in the trial between Petrus de Solandia and the abbot of Ryvaulx, in forges belonging to the Forest of Glaxtoll, and this is true, if he has withdrawn himself seasonably before the judgment, but after the judgment he will not be able. But I ask if a person can withdraw himself from some of the articles of the writ, and from some not? Likewise it is to be seen whether they are so connected that one cannot be determined without the other, or not so, and according to this let the proceedings go on or not. Likewise the writ abates, if he, who has sued it out, has died, or has been deposed, if perchance he be a bishop, an abbot, or a prior, or such-like, but not conversely, if a bishop or abbot or prior be the tenant, because the action together with the writ is pending until another be substituted for him, especially if the f. 415.
action be civil and not penal. But if it be civil and penal, the action will continue as regards the penalty

restitutionem quādiu depositus vixerit. Si autē depositus mortuus fuerit vel ante depositionem, extinguitur pœna cum ꝑsona, sed durabit in ꝑsona substituti quoad restitutionem, sed tamen ꝑ aliud bŕe. Item cadit bŕe, sed non actio, ꝑ mortem tenentis in actione ꝑsonali sive mortuus fuerit morte civili vel naturali, dum tamen ꝑ fraudem se non dimiserit post impetrationem, si mortuus fuerit morte civili. Item cadit bŕe mortuo eo, qui mandavit vel p̃cepit re integra. Item si quis ꝑ eadē re duo brevia impetraverit, et utroq̃ simul et semel agere incepit tam super jure q̃m super possessione, & differtur actio super ipso jure, & pendet bŕe donec discussum fuerit super possessione: ut de term̃ S. Trinitatis añ regis Henr̃ decimoquarto in com̃ Surr̃ de priore de Novo Loco, et hæc sive brevia impetrata fuerint ab uno vel duobus vel pluribus. Idem erit, si mulier dotem petat ꝑ bŕe de dote aliq̃m ꝑte,[1] & alius petat totum in actione ꝑprietatis, suspenditur actio dotis donec de ꝑprietate constiterit. Item si duo unum implacitaverint de una et eadem re, una et eadem actione et eodem brevi, ille p̃fertur qui prius incepit agere, et aliud bŕe simul cum actione in suspenso remanebit, sive hoc sit in eadē curia sive in diversis, exceptis curiis dñi regis, ubi nulla attenditur prioritas propter majoritatem et dignitatem suam, et ubi fallit regula, Qui prius incepit agere, ille aliis p̃feratur, ut supra de actionibus. Item cadit bŕe, ubi quis clamat tenere

Supra, f. 113 b.

[1] "aliq̃m parte" omitted, MS. Rawl. C. 160; "aliquam partem," MS. Rawl. C. 159.

and as regards the restitution as long as the deposed person shall live. But if the deposed person should die, or he should die defore deposition, the penalty is extinguished with his person, but [the action] shall continue in the person of his substitute as regards restitution, nevertheless however through another writ. Likewise the writ abates, but not the action, through the death of the tenant in a personal action, whether he be dead by a civil or by a natural death, provided however that he has not fraudulently demised himself after the writ has been sued out, if he is dead by a civil death. Likewise the writ abates when he is dead, who sent it or enjoined it when the matter was fresh. Likewise if any one has sued out two writs for the same thing, and has begun to proceed with both together and at the same time as well upon the right as upon the possession, and the action upon the right [is deferred and the writ is suspended until it has been settled concerning the possession, as in Holy Trinity term in the fourteenth year of the reign of king Henry in the county of Surrey, concerning the prior of New Place, and these whether the writs have been sued out by one person or by two or by three. The same will happen, if a woman claims dower by a writ of dower from some part and another claims the whole in an action for the property, the action for dower is suspended until the action for the property is settled. Likewise if two persons have impleaded one person concerning one and the same thing by one and the same action and with the same writ, he is preferred who began first to proceed, and the other writ together with the action will remain suspended, whether this be in the same court or in different courts, except the courts of the lord the king, where no priority is attended to on account of their superiority and dignity, and where the rule fails, "he who first began to proceed, let him be "preferred to the others," as above concerning actions.

de rege, et alius ab alio quâm de rege. Item eodem modo si duo tenere clamaverint de rege p certum servitium, quorum unus p minus servitium et alius p majus, brē illius cadit, qui per minus servitium, ppter utilitatem regis. Item cadit brē, si quis impetraverit super certa re et certa actione, & postmodum se retraxerit & in alio judicio velit agere de eodem. Item quædam exceptio contra brē substantiam capit ex tempore. Sunt autem quædam brevia limitata infra certa tempora, sicut sunt actiones ultra quas non extenditur brē non magis quàm actio ppter defectum pbationis, secundum q actio fuerit pdita super possessione vel super pprietate, sicut assisa novæ disseysinæ, mortis antecessoris, assisa de utrum, brē de ingressu, aut breve de recto ut supra. Item cadit breve, ut si quis per narrationem in judicio factam recesserit de brevi suo, excedendo virtutem & naturam brevis, ut si agatur in causa possessionis per brē de consanguinitate, & petens in narratione sua mentionē fecerit de ipso jure, vel si unum ore petat, & per brē diversum, nisi ita sit cùm dicat diversum q dicat q tantūdem valet. Et fere omnes exceptiones quæ cōpetunt alicui, licet vel contra aliquem, connumerari poterunt inter exceptiones contra breve, quia cùm terminatur actio finitur brē, & ubi cadit actio cadit & brē, & ubi differtur actio vel suspenditur vel mutatur, ita & brē. Cùm autem plures competant exceptiones contra brē, non possunt (secundum quosdam) proponi temporibus diversis, sed in potestate judicis erit arctandi tenentem q simul et semel uno die pponat omnes

Likewise a writ abates where a person claims to hold from the king, and another from a different person from the king. Likewise, in the same way, if two claim to hold from the king for a certain service, of which one claims by a less service and the other by a greater service, the writ abates of the person, who claims by a less service, on account of the king's interest. Likewise a writ abates, if a person has sued it out upon a certain thing and in a certain action, and has afterwards withdrawn himself, and wishes in another court to proceed for the same thing. Likewise a certain exception against a writ takes substance extemporaneously. There are however certain writs limited within certain times, as there are actions beyond which a writ does not extend any more than an action on account of a defect of proof, according as the action has been brought concerning the possession or concerning the property, as an assise of novel disseysine, of mortdancester, an assise of Utrum, a writ of entry, or a writ of right as above. Likewise a writ abates, as if any one in the pleadings argued in court has receded from his writ, by exceeding the virtue and nature of the writ, as if the proceeding be in a cause of possession through a writ of cosinage, and the claimant in his pleadings has made mention of his right of property, or if he claims one thing orally and a different thing by his writ, unless it be that when he says a different thing he says what is equivalent. And almost all exceptions to which a person is entitled, although against a person, may be enumerated amongst the exceptions against the writ, because when the action is terminated the writ is finished, and when the action abates the writ also abates, and where the action is deferred or is suspended or is changed, the writ is so likewise. But when several exceptions are available against a writ, they cannot (according to some) be propounded at different times, but it is in the power of the judge to confine the tenant that he should pro-

f. 415 b. exceptiones competentes contra breve, & sic præcludi poterit via ꝑponendi ulterius exceptiones contra breve. Sed cùm tenens unam ꝑposuerit q̄ rem petitam totā non tenuerit, sed alius, illa terminata ulterius non redibit ad consimilem, ut infra dicetur plenius. Et notandum q̄ cùm breve ceciderit per defectum & errorem, si corrigatur, consimile erit correctum & eadem erit actio quæ prius & idē br̃e sed correctū, licet aliud ꝑgamenū et aliud incaustum, & ideo nec mutari debet narratio prius facta in judicio, nec attornatus qui prius[1] fuerit, cùm eadem sit hinc inde actio & breve idem.

Cap. XVIII.

1. Si competat exceptio ex persona petentis, unde quædam dilatoria, quædam peremptoria multis rationibus.

Cum autem nihil sit quod excipi possit contra br̃e, tunc videndū si sit exceptio quæ competat tenenti ex persona ipsius petentis, quod omnino petere non possit, vel nō nisi post tempus omnino, ut si petens servus fuerit vel bastardus vel seculo mortuus, sicut ille qui habitū religionis assumpsit. Itē ꝑpter defectum scientiæ, ut si furiosus & nō sanæ mentis. Itē ꝑpter defectum sensuum, ut si fuerit naturaliter surdus vel mutus. Item ꝑpter morbum incurabilē, ut si leprosus fuerit & à cōmunione hominum separatus. Itē q̄ ei non competat actio, cûm sit amotibilis, sicut monachus vel canonicus non ꝑpetuus. Item ꝑpter feloniam ꝑpriam vel antecessorum. Item si non nisi post tēpus, quia minor infra ætatem agere nō potest in causa ꝑprietatis,

[1] "qui prius factus fuerit," MSS. Rawl. C. 159 and 160, Reg. 9 E. xv.

pound at the same time and together on one day all the exceptions available against the writ, and so the way for propounding further exceptions against the writ may be barred. But when the tenant has propounded one exception that he does not hold all the thing claimed, but another person, upon that being terminated he shall not return to a similar exception, as will be explained below more fully. And it is to be noted that when the writ has abated through a defect and an error, if it be corrected, the corrected writ will be of a similar character, and it will be the same action as before, and the same writ but corrected, although a different parchment and a different ink, and therefore pleadings already made in court ought not to be changed, nor the attorney who was previously appointed, since the action is the same on either side, and the writ the same. f. 415 b.

Chapter XVIII.

But when there is no exception to be raised against the writ, then we must see if there be an exception, that is available to the tenant against the person of the claimant himself, that he cannot be a claimant at all, or not until after a certain time, as if the claimant be a serf or a bastard, or dead to the world, as a person who has assumed a religious habit. Likewise on account of defect of knowledge, as if he be mad or of unsound mind. Likewise on account of defect of the senses, as if he be naturally deaf or dumb. Likewise on account of an incurable disease, as if he be a leper and separated from all communion with mankind. Likewise because he is not entitled to bring an action, as he is removable, as a monk or a canon not perpetual. Likewise on account of his own felony or that of his ancestors. Likewise if not until after a certain time, because a minor cannot bring an action in a cause of

1. If an exception is available against the person of the claimant, whereof one is peremptory, and another is dilatory in many ways.

licet agere possit in causa possessionis, & hoc ꝑpter defectum scientiæ, cùm non multum distet à furioso, nec furiosus à bruto. Item ꝑpter dubium rei eventum, ut si quis fuerit in statu dubio dignitatis vel corporis, & sic in pendenti donec quid fiat vel non fiat: ut si quis appellatus sit de vita & mẽbris in causa criminali, in civili causa agere nõ potest antequam defendit se in criminali, non magis quàm tenens tenetur respondere in cõsimili dignitates,[1] ut si abbas vel prior vel alius à dignitate depositus, & ad tuitionẽ status sui ad superiorẽ appellaverit, quia si cum talibus ageretur vel ipsi agerent contra alios, sic possent judicia esse delusoria, cûm à tali casu omnia possent revocari. Item competit exceptio tenenti ex ꝑsona petentis ꝑpter defectũ nationis, ut si petens copulaverit se[2] inimicis dñi regis, ut si fuerit ad fidem dñi regis Franciæ, saltẽ donec terræ & regna cõmunia extiterint, actio talibus denegatur. Item cõpetit tenenti exceptio ꝑpter lepram animæ petentis, ut si fuerit excõmunicatus nominatim, sed non in genere, quia sicut lepra esse poterit in corpore ita et in anima, & sicut leproso interdicitur cõmunio gentium, sic et excõmunicato, & q plus est, omnis actus legitimus. Item cõpetit tenenti exceptio non tantũ ex ꝑsona petentis, sed ratione cohæredũ & ꝑticipũ, sine quibus agere nõ possit, quia tantundẽ juris habent quantũ ille qui petit, vel aliũde: quia ille qui petit nihil juris habet

Infra, fol. 427 b.

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[1] "in consimili dignitate," MS. Rawl. C. 159 and 160.

[2] "complacitaverit inimicis," MS. Rawl. C. 160; "copulaverit se inimicis," MS. Reg. 9 E. xv.

property whilst under age, although he may bring an action in a cause of possession, and this on account of a defect of knowledge, since he does not differ much from a madman, nor a madman from a brute. Likewise on account of the doubtful result of a matter, as if a person should be in a doubtful state of dignity or of personalty, and so be in a pending state until a certain thing be done or be not done: as if a person has been charged in a criminal cause with an offence touching life or members, he cannot proceed in a civil cause until he has cleared himself in the criminal cause, no more than a tenant is bound to answer in a similar state of dignity, as if an abbot or prior or any other person has been deposed from a dignity, and has appealed to a superior for the protection of his *status*, because if actions were brought against such persons or they were to bring actions against others, the judgments might be illusory, since everything might be revoked by such an accident. Likewise an exception is available to the tenant against the person of the claimant on account of a defect of nationality, as if the claimant has become an accomplice with the enemies of the lord the king, as if he be of fealty to the lord the king of France, at least until the lands and the realms have become common, an action is denied to such persons. Likewise the tenant is entitled to an exception against the leprosy of the soul of the claimant, as if he has been excommunicated by name, but not generally: for as leprosy may exist in the body, so it may exist in the soul; and as a leper is interdicted from all communion with mankind, so likewise is an excommunicated person, and what is more, he is interdicted from every legal act. Likewise a tenant is entitled to an exception not only against the person of the claimant, but in respect of coheirs and coparceners, without whom he cannot bring an action, because they have as much right as he has who claims; or for another reason, be-

sed ali[2], vel cùm alius plus juris habeat, & sic quòd petens sine aliis agere non potest vel omninò non. Item competit tenenti exceptio ratione petentis vel
f. 416. ratione adjuncti, ut si vir agere velit de re uxoria sine uxore, et quo casu non magis audietur qm uxor sine viro, sed non cadit breve si vir sine uxore, quia vocare poterit uxorem ad warrantū, sed non è contrariò. Itē cōpetit exceptio tenēti cōtra petentē ratione superioris q̃m res tangit in aliquo, sicut sunt priores ꝑpetui & quandoq̃ amotibiles sine abbate vel priore, clerici et canonici[1] sine episcopo et patrono. Itē fratres alicujus domus sine curatore domus, & aliquādo nec sanctimoniales[2] sive sorores sicut sorores de Bockland sine priore hospitalis, et quo casu vocādi sunt curatores ad sequēdū, sine quibus fratres et sorores sequi non poterūt. Exceptione vero servitutis ꝑposita cōtra petentē, satis ꝑpendi poterit quid fieri oporteat tā in causa possessionis qm ꝑprietatis ꝑ ea, q̃ superius dicta sūt in tractatu de assisa novæ disseysinæ, ubi respōdetur cōtra assisam.

2. Exceptio contra petentem ex persona petentis.

Itē cōpetit exceptio tenēti cōtra petētē ex ꝑsona ipsius petentis peremptoria, ut excludat eum ab actione imperpetuū, eo quòd nihil juris habeat, cùm sit bastardus, & aliquando opponitur in modū exceptionis, secundū q hic dicitur, et cùm ꝑponatur à tenente, quandoq̃ cadit loco actionis quasi ꝑponitur[3] à petente

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[1] "vel canonici," MS. Rawl. C. 160.

[2] "aliquando sanctimoniales sive "sorores," MS. Rawl. C. 159.

[3] "quandoque cadit loco actionis "quasi proposita," MS. Rawl. C. 160; "quandoque cedit loco actionis "quum proponatur," MS. Rawl. C. 159.

cause he who claims has no right but another has, or when another has more right, and so that the claimant cannot bring an action without the others, or not at all. Likewise the tenant is entitled to an exception with regard to the claimant or with regard to an adjoint person, as if a husband should wish to bring f. 416. an action concerning a matter of his wife's without his wife, and in which case he shall not be heard any more than his wife without her husband; but the writ does not abate, if the husband should proceed without his wife, because he may call his wife to warrant, but not the converse. Likewise an exception is available to a tenant against a claimant by reason of a superior lord whom the matter concerns in some respects, such as are priors perpetual and sometimes removable without an abbot or prior, clerks and canons without a bishop and patron. Likewise brethren of any religious house without the curator of the house, and sometimes devout women or sisters such as the sisterhood of Bockland without the prior of the Hospital, and in which case the curators are to be called to sue, without whom the brethren and the sisterhood cannot sue. But upon an exception of serfdom having been propounded against the claimant, it can be sufficiently ascertained what ought to be done as well in a cause of possession as in a cause of property, through what has been said above in the treatise concerning an assise of novel disseysine, where an answer is made against the assise.

2. An exception against the claimant upon the personal status of the claimant.

Likewise the tenant is entitled to raise a peremptory exception against the claimant upon the personal *status* of the claimant, so as to exclude him in perpetuity from bringing an action, on the ground that he has no right, since he is a bastard, and it is sometimes objected in the manner of an exception, according to what is here said, and when it is propounded by a tenant, it sometimes abates in the place of the action as if it

cōtra tenentē, ut ita à possessione amoveatur. Et unde videndū inprimis qualiter opponi debeat &c. & cui, & â quo & in qua actione, & qualiter cōtra exceptionē respōdeatur alii, cûm fuerit opposita. Itē qualiter ꝑbari debeat, et ubi opponi, et ubi terminari, & ad q̄m sequi ptineat, & q̄ sit officiū judicis ecclesiastici, & quod sit officiū secularis. Item quis legitimus dici debeat et quis bastardus, quoad successionē secundū legē et cōsuetudinē Angliæ.[1] Itē quid juris si uterq̄ bastardus, tam petens q̄m petens. Itē quid juris si, cûm legitimatio ꝑbata fuerit, moriatur ille qui ꝑbaverit anteq̄m ad curiā regiā[2] ꝑvenerit cū ꝑbatiōe.

Cap. XIX.

1. De exceptione bastardiæ in casibus bastardiæ, quod nulla bastardia simplex, sed quælibet causam habet certam.

f. 416 b.

Qualiter opponi debeat bastardia inprimis vidēdum. Proponi quidē solet aliquando cum adjectione causæ quare bastardus sit, et quandoque sine causa, sed quoniam ubi causa non adjicitur sub tali responsione poterit esse obscuritas & incertitudo, quia cùm sciri non poterit ad quod forum pertinere debeat cognitio, non refert utrum quis omninò non respondeat vel obscurè: ut si dicat tenens simpliciter quod petens nihil juris habet in re petita, quia bastardus est, & paratus est probare bastardiam, ubi et quando debuerit, si ꝑhibitio ex tali ꝑbatione & respōsione statim mittatur ad curiam Christianitatis, ita poterit quidem ꝑbatio q̄libet indifferenť fieri in curia Christianitatis, q̄ in quibusdā cōtraria est legi & cōsuetudini Angliæ,[3]

[1] "Anglicanam," MS. Reg. 9. E. xv.

[2] "regiam" omitted, Rawl. C. 160.

[3] "Anglicanæ," MS. Rawl. C. 160 et Reg. 9. E. xv.

were propounded by the claimant against the tenant, so that he may be removed from the possession. And hence it is to be seen in the first place in what way it ought to be objected, &c., and to whom, and by whom, and in what action, and how an answer is to be made to another person against the exception, when it has been raised. Likewise how it ought to be proved and when to be objected to, and when to be determined, and to whom it pertains to sue, and what is the office of the judge ecclesiastical, and what is the office of the secular judge. Likewise who ought to be called legitimate, and who a bastard, as regards succession according to the law and custom of England. Likewise what is the right when each is a bastard, the claimant as well as the tenant. Likewise what is the right, if, when legitimation has been proved, he shall have died, who has proved it, before he has arrived at the court of the king with the proof.

Chapter XIX.

1. Of the exception of bastardy in cases of bastardy, because no bastardy is simple, but each has its certain cause.

We must first see in what way bastardy is to be objected. It is usually propounded with the addition of a cause wherefore he is a bastard, and sometimes without a cause, but since where a cause is not added there may be under such an answer obscurity and uncertainty, because when it cannot be known to what *forum* the cognisance ought to belong, it does not matter whether a person answers not at all or obscurely: as if the tenant shall say simply that the claimant has no right to the thing, because he is a bastard, and he is prepared to prove bastardy, where and when he ought to do so, if a prohibition upon such a proof and answer should be immediately sent to the court of Christianity, a proof indeed might so be made indifferently in the court of Christianity, which in some cases is contrary to the law and custom of England, which ought not to f. 416 b.

q esse non debet, cum nihil aliud sit sub tali obscuritate transmittere inquisitionem de bastardia faciendā ad curiā Christianitatis, qm venirē cōtra legem & cōsuetudinem Angliæ.[1] Ad talem igitur errorem tollendū, necesse est causam addiscere,[2] ut si dicat tenens, Frater, nihil juris[3] habes in t̄ra petita quia bastard⁹ es, quia pater tuus nūqm despōsavit matrem tuā, talis cognitio bastardiæ rectè ꝑtinet ad judicem ecclesiasticū, ex quo p̄cisè dedictū est matrimoniū, quia nō ꝑtinet ad judicem secularem discussio utrū sit ibi matrimoniū vel nō, cū ipse cui objicitur dicat cōtrariū. Idem erit si dicat, Frater, nihil juris habes in t̄ra illa, licet matrimoniū intervenerit, quia inter patrem tuū & matrē tuā cōtractū fuit matrimoniū illegitimū, ex quo prius cōtraxit cū quadā, q̄ vixit tempore quādo cōtraxit cum matre tua. Est igitur ad curiā Christianitatis inquisitio in hoc transmittenda, quia ad judicem secularem nō ꝑtinet discussio quis eorū &[4] q̄ illarū sit legitima uxor & q̄ nō. Itē opponi poterit bastardia, cū adjectione causæ ut supra, sed nō erit ad curiam Christianitatis inquisitio demādanda, quia nihil ꝑtinet ad judicem ecclesiasticū cognoscere de prioritate vel posterioritate nativitatis ejus cui opponitur bastardia, cū spōsalia vel matrimoniū hinc inde concessa sint, nō magis qm si quis ita diceret, Frater, nihil juris habes in terra illa, & si jus haberes petere non potes, quia petis de tempore regis Henr̄ senis, vel ulterius q omnem excludit actionem, vel si dicat tenens sic: Frater, nihil juris habes in t̄ra petita quia bastardus,

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[1] Anglicanam, MS. Rawl. C. 160 et Reg. 9 E. xv.

[2] "adjicere," MSS. Rawl. C. 159 and 160.

[3] "juris," omitted, MS. Rawl. C. 160.

[4] "quis eorum et," omitted, MSS. Rawl. C. 159 and 160.

be, since to transmit an inquest to determine bastardy under such obscurity to the court of Christianity would be nothing else, than to go against the law and custom of England. To remove therefore such an error it is necessary to add a cause, as if the tenant should say, " Brother, thou hast no right to the land claimed be- " cause thou art a bastard, because thy father never " espoused thy mother," such a cognisance of bastardy rightly belongs to an ecclesiastical judge, since a marriage has been precisely denied, because it does not belong to the secular judge to determine whether there has been there a marriage or not, when he to whom the objection has been raised asserts the contrary. It will be the same as if he said, " Brother, thou hast no right " to that land, although a marriage has intervened, " because an illegal marriage was contracted between " thy father and thy mother, since he had previously " contracted a marriage with a certain woman, who was " alive at the time, when he contracted a marriage with " thy mother." An inquest is therefore to be transmitted to the court of Christianity in this matter, because it does not belong to the secular court to decide, which of them is the legitimate wife and which not. Likewise bastardy may be objected, with the addition of the cause as above, but the inquest will not have to be committed to the court of Christianity, because it does not pertain to the ecclesiastical judge to take cognisance concerning the priority or posteriority of the birth of him to whom bastardy is objected, when espousals or matrimony have been conceded on either side, no more than if a person should say thus, " Brother, thou hast no right to that land, " and if thou hast a right, thou canst not claim it, be- " cause thou claimest from the time of the old king " Henry, or further back, which excludes any action," or if the tenant should say thus, " Brother, thou hast " no right to the land claimed by thee, because thou

quia natus fuisti ꝑ tantum temp⁹ ante sponsalia vel matrimoniū contractū inter patrē tuum & matrē tuam. Et quia hinc inde conceditur matrimonium, bene poterit rex in curia sua inquirere sine alicujus p̃judicio utrū talis, cui objiciatur, natus sit ante matrimoniū vel post, sicut inquirere poterit in aliis casib⁹ utrū natus in tempore regis H. vel regis J., & maxime in defectū episcoporū, quia cōtrarii sunt legibus & consuetudinibus Angliæ,[1] nec etiam magis injuriosum est quàm si rex in placito dotis in curia sua fieri faciat inquisitionē utrum mulier dotem petens dotata sit ad ostium ecclesiæ vel alibi, vel utrum sponsalia vel matrimonium publicum sit vel clandestinum. Et cùm in curia domini regis anno regni sui vicesimo in crastino sancti Vincentii apud Merton coram venerabilii parte[2] tunc Cantuar̃ archiepiscopo, & coram suffraganeis suis omnibus, & coram majore parte comitum & baroñ Anglie tunc & ibidem existentium ꝑ coronatione regis & reginæ, pro qua omnes vocati fuerunt, generaliter tractatum esset de communi utilitate totius regni super pluribus articulis regem & reginam tangentibus, inter alia tractatum esset de hujusmodi objectione bastardiæ, utrū vz. quis natus ante sponsalia & matrimonium haberi possit ꝑ legitimo sicut ille qui post matrimonium natus fuit. Ad quod omnes episcopi respōderūt q̃ omnes illi, qui nati fuerunt ante spōsalia vel matrimonium, ita erunt legitimi sicut illi, qui nati erunt post matrimonium, quoad Dn̄m Deū et quoad ecclesiā, nec voluerunt nec potuerūt sine p̃judicio ecclesiasticæ dignitatis respōdere ad br̃e super hujusmodi inquisitione facienda de bastardia sic objecta, rescribere

Math. Paris, Chronica Majora. 23 Jan. A.D. 1236.

f. 417.

[1] "Anglicanis," MSS. Rawl. C. 160, et Reg. 9 E. xv.

[2] "patre E.," MSS. Rawl. C. 159 et 160.

" art a bastard, because thou wast born so long a time " before that espousals or a marriage was contracted " between thy father and thy mother." And inasmuch as a marriage is conceded on either side, the king may well inquire in his court without prejudice to any one whether so-and-so, against whom the objection is raised, was born before matrimony or afterwards, as he may inquire in other cases whether he was born in the time of king Henry or of king John, and especially in the default of bishops, because they are opposed to the laws and customs of England : nor is it more against right than if the king in a suit for dower in his court should cause an inquest to be held, whether the woman claiming dower was endowed at the church door or elsewhere, or whether the espousals or marriage was public or clandestine. And when in the court of the lord the king in the twentieth year of his reign, on the morrow of St. Vincent's day at Merton, in the presence of the venerable father Edmund the then archbishop of Canterbury and in the presence of all his suffragans and in the presence of the greater part of the counts and barons of England then and there present for the coronation of the king and of the queen, for which all had been summoned, it was generally treated of matters concerning the common interest of the whole kingdom upon several articles touching the king and the queen, it was amongst other things treated of bastardy, to wit, whether a person born before espousals and matrimony could be held to be legitimate as he who was born after matrimony. To which all the bishops answered that all who were born before espousals or matrimony were as legitimate as those who were born after matrimony as regarded the f. 417. Lord God, and as regarded the Church, nor were they willing or able without prejudice to the ecclesiastical dignity to make answer to a writ upon an inquest of that kind to be made upon an objection of bastardy so raised, (namely) to write back to the lord the king, to

dño regi, vz., utrū ante vel post, quia hoc esset in p̃judiciū S. Ecclesiæ, ut dicebāt, sed rogabant regē et magnates q̃ ad hoc consensum p̃berent, q̃ nati ante matrimoniū quoad omnia legitimi esse possent, sicut illi qui post, et omnes comites et baroñ, quotquot fuerūt, responderunt una voce q̃ noluerunt leges Angliæ mutare, q̃ usq̃ ad tēpus illud usitatæ fuerunt & approbatæ.

2. De mittendo ad curiam Christianitatis utrum ante vel post matrimonium constitutio concessa et approbata coram rege et consilio suo clericis et laicis.

Postea verò die Jovis p̃ximè post festum S. Dionisii anno eodem[1] coram ipso dño rege & subscriptis, convocato consilio p̃visum fuit & concessum ab ipso dño rege coram venerabili patre E. Cantuariensis archiepiscopo, R. Cycestr̃ episcopo dñi regis cācellario, R. Dunolm̃ episcopo, H. Eliens. episcopo, episcopo Norwic., episcopo Londoñ, episcopo Bathoñ, episcopo Exoñ, episcopo Karleol, episcopo Hereford et episcopo Roffeñ. Itē corā baronibus subscriptis:[2] Richardo com̃ Corūbiæ et Petro,[3] G. com̃ Marr., J. com̃ Linc., W. com̃ Warhā,[4] J. com̃ Cestr̃, W. com̃ Ferr̃, T. com̃ Warr̃, H. com̃ Kāc., H. de Ver[5] com̃ Oxoñ, H. com̃ Hereford, Simō de Monte Forte com̃ Leic.[6] Itē corā baronibus subscriptis, Radulpho de Tony, Philippo de Albinaco, R. filio Michaelis, H. filio Machute, J. Marescalł, G. de Lucy, R. de Argentō, H. dispensatore, W. de Say, W. Bardolph, W. de Cantelupo seniore & W. juniore, R. Sylkard, W. de Bromich,[4] A. de S. Amando, B. Curiall,[2]

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[1] "anno eodem," according to the Tower series of the Placita coram Rege, this constitution had been enacted in the eighteenth year of the reign of king Henry. See Introduction.

[2] "coram omnibus subscriptis," MS. Rawl. C. 159; "coram comi-" tibus subscriptis," MS. Reg. 9 E. xv.

[3] "et Petro," this is an evident miswriting for "et Pictav.," which is the reading of MS. Rawl. C. 160. Gilbert was the single Christian name of the earl Marshall, who was appointed marshall on June 11 1234, in succession to his brother Richard.

[4] "com Warrenn.," MS. id.

[5] "H. de Veer," MS. id.

[6] "com. Leycestriæ," MS. id. See Introduction.

[7] "Godefroi de Bromich," MS. id

[8] "Bertin de Curiel," id.

wit, "whether before or after," because this would be to the prejudice of Holy Church, as they said, but they requested the king and the magnates that they should give their consent to this, that children born before matrimony might be legitimate in all respects as children born after it, and all the counts and the barons, as many as were there, answered with one voice that they were unwilling to change the laws of England, which up to that time had been in use and approved.

2. A constitution concerning the sending to the court of Christianity a question "whether before or after matrimony," conceded and approved in the presence of the king and his council, clerics and laics.

But afterwards on Thursday next after the festival of St. Denys in the same year, in the presence of the lord the king and the undersigned, a council having been convoked, it was provided and conceded by the lord the king himself in the presence of the venerable father Edmund archbishop of Canterbury, Ralph bishop of Chichester the chancellor of the lord the king, Richard bishop of Durham, Hugh bishop of Ely, the bishop of Norwich, the bishop of London, the bishop of Bath, the bishop of Exeter, the bishop of Carlisle, the bishop of Hereford, and the bishop of Rochester. Likewise in the presence of the undersigned earls, Richard earl of Cornwall and Poitiers, Gilbert earl Marshall, John earl of Lincoln, William earl of Warren, John earl of Chester, William earl of Ferrars, Thomas earl of Warwick, Hubert earl of Kent, Hugh de Vere, earl of Oxford, Humphrey earl of Hereford, Simon de Montfort, earl of Leicester. Likewise in the presence of the undersigned barons, Ralph de Tony, Philip de Albinaco, Richard Fitz-Michael, Henry Fitz-Machute, John Mareschal, Geoffrey de Lucy, Reginald de Argenton, Hugh Despenser, William de Say, William Bardolf, William de Cantilupe senior, and William junior, Richard Sylkard, William de Bromich, Almeric de S. Amando, Bertram Curiall, Engelard de Syngoy, Robert

E. de Syngoy, R. de Mussengoy,[1] B. de Pancy,[2] G. de Lucy, R. filio Hug. & & aliis qm pluribus tunc ibidē p̃sentibus, q̄ de cætero cùm bastardia objecta fuerit alicui de tali causa in curia dñi regis q̄ bastardus sit, & ideo bastardus quia natus ante sponsalia vel matrimoniū cōtractum inter patrem suū & matrē suam, mittatur loquela ad ordinariū loci & fiat inquisitio p̄ hæc verba, utrū videlicet talis natus fuerit ante spōsalia sive matrimonium vel post, & rescribat ordinarius p̄ eadē verba domino regi sine aliqua cavellatione. Et in inquisitione illa facienda cesset omnis appellatio, sicut in omni alia inquisitione de bastardia, de qua inquisitio demādāda fuerit alicui ordinario faciēda, & maxime q̄ nulla fiat appellatio extra regnū, si de necessitate cōtingat appellari, & tūc p̃ceptum fuit q̄ ita teneretur & observetur in futuro tā de illis qm de quibus judiciū extunc faciendū esset in curia dñi regis, tam de placitis inceptis qm incipiendis, cûm hujusmodi bastardia objiciatur ex tali causa. Et q̄ assisa mortis antecessoris p̄cessit in curia dñi regis super hujusmodi bastardia infra ætatē petentiū, & ubi jurata dixit q̄ nō fuerunt hæredes p̄pinquiores, quia nati fuerunt in adulterio ante matrimoniū: p̄batur in itinere M. de Pateshull in coñ Canť, anno regis H. filii J. undecimo, assisa mortis antecessoris, si Henricus

[1] "R. de Mushegros," MS. Rawl. C. 160.

[2] "Baldewyno de Pansy," id.

de Mussengoy, Baldwin de Pancy, Geoffrey de Lucy, Richard Fitz Hugh, and several others then present, that henceforth when bastardy has been objected to any one for such a cause in the court of the lord the king, that he is a bastard, and a bastard for this reason because he was born before espousals and before marriage was contracted between his father and his mother, the trial should be committed to the ordinary of the place and an inquest be held under these words, whether forsooth so-and-so was born before espousals and marriage or afterwards, and let the ordinary report under the same words to the lord the king without any cavil. And in holding that inquest let all appeal cease, as in every other inquest concerning bastardy, concerning which it has been committed to any ordinary to hold an inquest, and especially that no appeal be made out of the kingdom, if of necessity there has happened to be an appeal, and then it was enjoined that it should be so held and observed in future as well in those matters concerning which judgment was then to be given in the court of the lord the king as concerning suits already commenced as well as those to be commenced, when bastardy of this kind is objected for such a cause. And that an assise of mortdancester proceeded in the court of the lord the king upon bastardy of this kind of claimants under age, and where a jury said that they were not the nearest heirs, because they were born in adultery before marriage, is proved in the iter of Martin de Pateshull in the county of Kent in the eleventh year of the reign of Henry the son of John, an assise of mortdancester,[1] if Henry Pamsore in the

[1] It is probable that this case, as it is not cited in the best manuscripts, is an interpolation. Bracton, however, may have cited it in evidence of the practice of the Curia Regis before the king in a council held on Thursday after 9th October 1234 regulated the issue to be sent to the court of the ordinary, whenever bastardy was alleged by reason of the child having been born before the marriage of its parents.

Pamsore deceñ Norlington.[1] Rationib⁹ igitur supradictis & ex tali cōmuni cōsensu, in electiōe dñi regis esse poterit utrū velit īquisitionē illā faciēdā demādare ordinariis vel illā facere in cur̄ sua, quia si illā in cur̄ sua feceŕ, cū exceptio ei data fuerit et apta et ex cert̄ causa, nō debet respōsio esse obscura, sed sicut opponit̄ exceptio q̄ secūdū legē et cōsuetudinē Angl̄
f. 417 b. bastard⁹ est, eo quòd natus ante sponsalia vel matrimoniū, & sic ex tali causa replicare debet petens et dicere q̄ legitimus est ex causa contraria, quia natus est post sponsalia vel matrimoniū, & sic contradicere intentioni tenentis, quia non contradicit, sed dicit simpliciter q̄ legitimus sit & paratus p̄bare se legitimum ubi debuerit, quia ad causam non respondet.[2] Debet igitur dicere causam q̄ legitimus, quia natus post sponsalia vel matrimoniū. Si autem ex tali obscura responsione mittatur ad curiam Christianitatis, et rescribatur obscurè q̄ legitimus, vel si causa objecta fuerit & non rescribatur p̄ eadem verba, sed q̄ legitimus sit, in defectū curiæ Christianitatis fiat inquisitio in curia dñi regis utrum ante matrimoniū vel post, quia videtur p̄ hoc q̄ ibi possit esse fallacia, & verum rescribatur et falsum, sed diversis respectib⁹, quia poterit esse legitimus secundū statuta ecclesiæ quantum ad ordines, et quātum ad dignitates, et quantū ad leges et cōsuetudines Anglicanas bastardus quantū ad successiones, quia ibi licet[3] legitimus ad p̄dicta,[4] sive ante sive post. Et cùm taliter objecta fuerit bastardia ex causa tali, si petens obscurè respondeat, denegetur ei actio ac si nihil respondisset, & tenens se teneat in pace. Si autē tenenti objecta fuerit et sic obscurè respon-

[1] "Et quod assisa" down to "Norlington," omitted, MS. Rawl. C. 160 et 159.

[2] "respondere debet," MS. Rawl. C. 160.

[3] "quia autem licet," MSS. Rawl. C. 160 & 159.

[4] "quantum ad prædicta," MS. Rawl. C. 159.

tything of Norlington. For the reasons above said and from such a common consent, it may be in the choice of the lord the king whether he chooses to commit the making of that inquest to the ordinaries or to make it in his court, because if he shall make it in his own court, when an exception has been taken against him both open and from a certain cause, the answer ought not to be obscure, but as the exception is raised that according to the law and custom of England he is a bastard inasmuch as he was born before espousals and matri- f. 417 b.
mony, and so upon such a cause the claimant ought to reply and say that he is legitimate from a contrary cause, because he was born after espousals or matrimony, and so to contradict the declaration of the tenant, because he does not contradict, but says simply that he is legitimate and prepared to prove that he is legitimate, when he ought to do so, because he does not reply upon the cause. He ought therefore to state the cause why he is legitimate, because he was born after espousals or matrimony. But if upon such an obscure answer it be sent to the court of Christianity, and it be reported by it obscurely that he is legitimate, or if the cause be objected and it be not reported in the same words, but that he is legitimate, in the default of the court of Christianity let an inquest be held in the court of the king whether before or after matrimony, because it seems thereby that there may be here a fallacy, and the report may be true and false, but in different respects, because he may be legitimate according to the statutes of the Church as regards orders and as regards dignities, and with respect to the laws and customs of England a bastard in what regards successions, although legitimate for the aforesaid purposes, whether before or after. And when bastardy has been objected from such a cause, if the claimant answers obscurely, let the action be denied to him as if he had made no answer, and let the tenant keep himself in peace. But if it has been objected to

derit, quasi indefensus rem possessam amittat, quia non omninò respondere vel obscurè ad paria judicantur. Ad papam et ad sacerdotiū quidem ptinent ea quæ spiritualia sunt, ad regem vero et ad regnum ea quæ sunt temporalia, juxta illud, Cœlum cœli Domino, terram autem dedit filiis hominum. Et unde ad papam nihil pertinet ut de tēporalibus disponat vel ordinet, non magis qm reges vel principes de spiritualibus, ne quis eorum falcem imittat in messem alienam. Et sicut papa ordinare potest in spiritualibus quoad ordines et dignitates, ita potest rex in temporalib[9] de hæreditatibus dandis vel hæredibus constituendis secundum consuetudinem regni sui. Habet enim quodlibet regnum suas consuetudines et diversas, poterit enim una esse cōsuetudo in regno Angliæ, et alia in regno Franciæ quantum ad successiones. Et notandum quòd, si quis opponendo bastardiam mentionem non faciat de hac dictione (bastardus), amittet per judicium: ut si dicat, Frater, nihil juris habes in terra illa quia natus fuisti ante matrimonium, nulla facta mentione de bastardia: ut in itinere W. de Ralegh, in comitatu Warr̃, assisa mortis antecessoris, si Willhelmus de Munworth[1] pater Thomæ. Opponi etiam poterit bastardia multis de causis instituta actione, aliquando in judicio, aliquando ad querelam ejus qui dicit se esse verum hæredem, & de quibus non oportet transmittere loquelam ad curiam Christianitatis vel inquisitionem, ut si partus nascatur post mortem patris (qui dicitur posthumus)[2] per tantum tempus, quòd non sit verisimile quòd possit esse defuncti filius, & hoc probato, talis

[1] "Muneworth," MS. Rawl. C. 159.

[2] "postumus," MS. Rawl. C. 160.

the tenant, and he has thus answered obscurely, let him lose the thing which he holds as if he were without a defence, because to answer not at all and to answer obscurely are judged alike. To the pope and to the priesthood, indeed, appertain the things which are spiritual, but to the king and to the realm those things which are temporal, according to the saying, the heaven to the to the Lord of heaven, but the earth he has given to the sons of man. And hence it does not pertain to the pope in any way to dispose of and to order temporal matters, no more than to kings to dispose of and to order spiritual matters, lest either of them should put his reaping hook into another's harvest. And as the pope may order in spiritual matters as regards orders and dignities, so may the king in temporal matters as regards granting inheritances or constituting heirs according to the custom of his kingdom. For every kingdom has its own customs and different ones, for there may be one custom in the kingdom of England and another in the kingdom of France as regards successions. And it is to be noted that, if a person in objecting bastardy does not make mention of this very phrase (bastard), he shall lose by the judgment, as if he should say, "Brother, " thou hast nothing in that land, because thou wast " born before matrimony," no mention being made of bastardy, as in the iter of William de Ralegh in the county of Warwick, an assise of mortdancester, if William de Munworth the father of Thomas. Bastardy may also be objected for many causes after an action has been instituted, sometimes in court, sometimes at the complaint of him who says that he is the true heir, and concerning which it is not requisite to send the trial of an inquest to the court of Christianity, as if an offspring be born after the death of the father (who is termed a posthumous child) after such an interval of time, that it is not probable that he is the child of the deceased person, and upon this having been proved, such a person

dici poterit bastardus. Item dici poterit bastardus & illegitimus et partus alienus falsò suppositus & nutritus ad exhæredationem veri hæredis, ubi mulier fecerit se prægnantem, cûm non sit. Item si inquiratur p quantum tempus natus fuerit post humationē patris, cujus filius esse debuit, ita quod non possit esse verisimile quòd sit filius talis. Idem dici poterit
f. 418. bastardus partus suppositus mortuo vero hærede sub custodia, ut supra de qualitate & differentia hæredis de ptu supposito. Item dici poterit bastardus ab alio quàm à patre pgenitus, ubi non sit verisimile aliqua ratione q possit esse hæres mariti, ut si pater abfuerit p longum tēpus in Terra Sancta, quod veritas vincere possit p̃sumptionem. Sed aliud erit, si vir in patria vel extra patriam prope quod accessum habere possit ad uxorem occulte, et maximè si maritus eum deadvocaverit omnino, nisi p̃sumptio faciat cōtra ipsum quod partus possit esse hæres, ut supra, et ibi de hac materia, ubi perpendi poterit quis sit legitimus & quis bastardus. Et sciendum q liberorum quidam possunt esse legitimi et quidam bastardi, et aliquando omnes legitimi et aliquando omnes bastardi, vel unus ex pluribus legitimus, et alii omnes bastardi, et è contrariô, ut supra perpendi poterit de qualitate hæredum. Item notandum, q cùm quis partum suppositum semel advocaverit, non poterit illum ulterius readvocare[1] si hoc pbari poterit, et erit talis filius et hæredes[2] de quocunque antecessore tenuerit. Et cùm capitales domini vel quidam illorum hæreditatem tali restituerint et quidam restituere contradixerint, opposita bastardia non valet contradictio, nec erit in hoc

[1] "deadvocare," MS. Rawl. C. 160. | [2] "hæres," MS. *id.*

may be called a bastard. Likewise he may be called a bastard and illegitimate and a strange offspring falsely set up and nursed to disinherit the true heir, where the woman has made herself out to be pregnant when she was not so. Likewise if an inquest be made as to how long he was born after the burial of the father whose son he is represented to be, so that it is not probable that he is the son of such a person. Likewise he may be called a bastard who is a supposititious offspring, the f. 418.
true heir having died under guardianship, as above concerning the quality and the difference of an heir from a supposititious offspring. Likewise he may be called a bastard who has been begotten by another person than the asserted father, where it is not likely upon any grounds that he can be the heir of the husband, as where the latter has been absent for a long time in the Holy Land, so that the truth may overcome the presumption [of law]. But it will be otherwise, if the husband has been within the country or out of the country but so near that he could have had access to his wife secretly, and especially if the husband has disavowed him altogether, unless the presumption makes against him that the offspring may be the heir, as above, and there concerning this matter, where it may be considered who is legitimate and who is a bastard. And it is to be known that of children some may be legitimate and some bastards, and sometimes all legitimate, and sometimes all bastards, or one out of several legitimate, and the others all bastards, and contrariwise, as may be above considered concerning the quality of heirs. Likewise it is be noted, that when once a person has avowed a supposititious offspring he cannot further disavow him, if this can be proved, and such a son will be the heir from whatever ancestor he may hold. And when the chief lords or some of them have restored the inheritance to such a person and some of them have refused to restore, a refusal upon the objection of bastardy does not avail, nor will an inquest

casu inquisitio demandanda ad forum ecclesiasticum, vel mittenda ad curiã Christianitatis: ut de itinere R. de Leinton[1] de quodã Adamo de Aston, qui in tali casu voluit transmittere loquelã ad curiam Christianitatis, q quidem revocatum fuit & correctũ p M. de Pateshull.

3. Quis possit opponere bastardiam.

Item videndum quis bastardiam opponere potest, et sciendum q ab eo ad quem pertinet, sicut à vero hærede contra eum, qui se facit hæredem cùm non sit, sive petens sit qui opponit sive tenens. Item ille qui loco hęredis est, sicut dominus capitalis, cùm in seysina fuerit hæreditatis sicut de eschaeta sua propter defectum hæredum tenentis sui, cùm non sit alius nisi ille qui petit, et sit bastardus. Si autẽ plures sunt qui se faciant hæredes, tunc non ptinebit ad dñm capitalem bastardiam objicere, quia quamvis competat contra hæredem, tamen non ptinet ad dominum capitalem ut illam opponat. Et quôd ad capitalem dominum non ptineat, ꝑbari poterit de terñ Paschæ anno regis Henr̃ duodecimo in coñ Berk. de Roberto Hachard, ubi terra esse debuit eschaeta sua: ut de itinere Martini de Pateshull in coñ Eborũ anno regis Henr̃ decimo, assisa mortis antecessoris si Radulphus de Bully, sed cùm capitalis dominus bastardum semel cognoverit ad hæredẽ, vel si reddiderit ei aliquam ptem hæreditatis ut legitimo, si postmodum ei velit bastardiam objicere, non audietur ut illam opponat: ut de terñ S. Hilarii anno regis Henrici decimoquarto in coñ Midd̃, de abbate S. Albani & Wilto filio Radulphi. Sed cõpetit vero hæredi contra fratrẽ et aliũ, qui se facit hæredem, cûm sit bastardus, sive unus eorũ sit hæres sive plures legitimi, vel unus vel plures bastardi qui se faciunt hæredes, sive

[1] "R. de Lexinton," MS. Rawl. C. 160 and 159.

in this case have to be remitted to the ecclesiastical *forum*, or to be sent to the court of Christianity, as in the iter of R. de Lexinton concerning a certain Adam de Aston, who in such a case wanted to transmit the trial to the court of Christianity, which was revoked and corrected by Martin de Pateshull.

3. Who can object bastardy.

Likewise it to be seen who can object bastardy, and it is to be known that it may be objected by him to whom it appertains, as by a true heir against him, who holds himself out to be the heir when he is not, whether it be the claimant who objects or the tenant. Likewise he who is in the place of the heir, as a chief lord, when he is in seysine of the inheritance as of his own escheat on account of the default of heirs of his tenant, when there is no other heir than the claimant, and he is a bastard. But if there are several who set themselves up as heirs, then it will not appertain to the chief lord to object bastardy, because although it is feasible against an heir, nevertheless it does not appertain to the chief lord to make such an objection. And that it does not appertain to a chief lord, may be proved from Easter term in the twelth year of king Henry in the county of Berks, concerning Robert Hachard, where the land ought to have been his escheat, as in the iter of Martin de Pateshull in the county of York, in the tenth year of king Henry, an assise of mortdancester if Ralph de Bully, but when a chief lord has once acknowledged a bastard as heir, or if he has restored to him any part of the inheritance as to the lawful heir, if he wishes afterwards to object to him bastardy, he shall not be heard to object it, as in Saint Hilary term in the fourteenth year of king Henry in the county of Middlesex, concerning the abbot of St. Albans and William Fitz-Ralph. But it is allowable to the heir against his brother, and any other who sets himself up as the heir, when he is a bastard, whether one of them be heir or there be several legitimate, or one or several bastards who set themselves up as heirs, whether they be tenants

tenentes sint sive petentes. Et si uterq̃ bastardus fuerit tã petēs qm tenēs, et petēs bastardiã objecerit tenenti, si tenēs replicãdo dixerit petētē esse bastardū, oportet petētē se docere legitimū, alioquin nihil capiat,
f. 418 b. cū melior sit in hoc casu conditio possidentis, & tunc capitalis dñ² petat, & ptinet ad ipsum exceptio.

4. Contra quem competat. Britton, l. iii. c. xxii. § 3.

Itē contra q̃m cōpetat, & sciendū q contra q̃mlibet tam masculū qm fœminã, tã cōtra minorē qm majorē, dū tamē, si infra ætatē sit minor cui opponitur, nō ꝑcedat inquisitio de bastardia ante ætatē, dū tamen minor tenens fuerit, quia nō magis tenetur respondere ad exceptionē de bastardia ante ætate, qm ad assisam, cùm exceptio bastardiæ tã in causa possessionis qm ꝑprietatis ꝫminet negotiū, ut de itinere M. de P. in coñ Kanc. ad festū S. M. añ regis Hērici undecimo incipiente duodecimo, assisa mortis antecessoris si Wilhelm̃ de Herst, ubi assisa venit super custodē, qui dixit q nihil habuit nisi nomine custodiæ cum quodã qui fuit infra ætatē, & de quo responsū fuit q bastardus erat. Si autē à majore contra minorē petentē, ꝑcedat assisa, ut in eodem itinere, assisa mortis antecessoris si Henr̃ Paufurere,[1] quibus à petentibus objecta fuit bastardia, & de quibus dixerunt juratores q bastardi fuerunt, quia nati ante matrimoniū, et processit assisa mortis antecessoris in curia regis.

5. Inter quas personas.

Itē non cōpetit exceptio bastardiæ nec locum habet inter conjunctas ꝑsonas, sed inter extraneas, in causa possessionis, nec in placito de cōsanguinitate, nō magis

[1] "Paunferer," MS. Rawl. C. 160.

or claimants. And if both be bastards, the claimant as well as the tenant, and the claimant has objected to the tenant bastardy, if the tenant in replying has said that the claimant is a bastard, it is requisite that the claimant should show that he is legitimate, otherwise he will take nothing, since the condition of him in possession is in this case the stronger, and then let the chief lord claim, f. 418 b. and the exception appertains to him.

4. Against whom it is available.

Likewise against whom it is available, and it is to be known that it is available against any person male as well as female, minor as well as of full age, provided that, if he be a minor against whom the objection is raised, the inquest concerning bastardy shall not proceed before he is of full age, provided however the minor is a tenant, because he is no more bound to answer to an exception of bastardy before his full age, than to an assise, since an exception of bastardy as well in a cause of possession as of property terminates the affair, as in an iter of Martin de Pateshull in the county of Kent at the festival of Saint Mary in the eleventh and twelfth year of king Henry, an assise of mortdancester, if William de Herst, where the assise was brought against the guardian, who said that he held nothing except in his character of guardian with a certain person who was under age, and concerning whom it had been answered that he was a bastard. But if the exception be made by a person of full age against a minor claimant, let the assise proceed as in the same iter, an assise of mortdancester if Henry Paufurere, to whom bastardy was objected by the claimants, and concerning whom the jurors said that they were bastards, because born before matrimony, and the assise of mortdancester proceeded in the court of the king.

5. Between what persons.

Likewise an exception of bastardy is not allowable nor has it a place between persons who are relatives, but between strangers in blood, in a cause of possession, nor in a plea of cosinage, no more than in an assise of

qm in assisa mortis antecessoris, quia ubi eadē ratio ibi erit & idem jus, inter tales psonas agitur de ipso jure, & non de aliqua possessione, si fuerit hæreditas descendens à cōmuni stipite, quia si inter eos teneretur hujusmodi exceptio, sic terminari posset ꝑprietas ipsa in placito possessionis: licet objici posset q bastardus sit tanquā extraneus quantū ad verū hæredē. Sed tamen inter eos non ꝓcedat ista exceptio, non magis qm assisa, quia adhuc in pendenti est utrum ille cui objicitur bastardia se ꝓbare posset legitimū vel non.

6. Cum objecta fuerit cum causa, oportet quod sequatur probatio.

Cùm autē sic objecta fuerit bastardia adjecta causa, non valet exceptio nisi ꝓbetur q tenens dicat petentem esse bastardum, et idem petens replicando dicat se esse legitimum vel e contrariò. Videndum ad q̃m illorum ꝓtineat ꝓbatio bastardiæ vel legitimationis, & videtur q ad ipsum ꝓtinebit in omni casu qui est extra seysinā, cùm ille qui est in seysina nō habeat necesse ꝓbare nec exceptionē si ipse exceperit de bastardia, neq̃ replicationē de legitimitate si bastardia objecta fuerit cōtra ipsum, ꝓpter cōmodum possessionis: quia cùm tenens objecerit exceptionē bastardiæ cōtra petentē, petens arctatur ad ꝓbationē legitimitatis, tenens ad ꝓbationem bastardiæ ꝓcedat &[1] excipiendo, oportebit petentē docere legitimū esse replicando, alioquin cadit à causa, & tenenti remanebit possessio. Si autē e contrariò à petenti tenēti opponatur bastardia, & q nihil juris habeat in ĩra qm tenet, quia bastardus: responderi poterit à tenente q ipse est in seysina, sicut hæres legitimus, unde opor-

[1] "et," omitted, MSS. Rawl. C. 160 and 159.

mortdancester, because where there is the same reason there will be the same right, between such persons proceedings are concerning the right itself and not concerning a certain possession, if it be an inheritance descending from a common stock, because if an exception of this kind would hold good between them, the property itself might so be determined in a plea of possession; although it may be objected that a bastard is as it were a stranger as regards the true heir. But nevertheless that exception should not proceed between them any more than an assise, because it is still pending, whether he against whom bastardy is excepted can prove himself to be legitimate or not.

6. When it has been objected with a cause, it is incumbent that proof should follow.

But when bastardy has been thus objected with the addition of a cause, an exception does not avail, unless it be proved that the tenant says that the claimant is a bastard, and the said claimant in his replication says that he is legitimate or the converse. It is to be seen to which of them the proof of bastardy or of legitimacy appertains, and it seems that in all cases it appertains to him who is out of seysine, since he who is in seysine has no necessity to prove neither the exception if he has raised an exception of bastardy, nor his replication of legitimacy if bastardy has been objected against him, on account of the advantage of possession: because when the tenant has raised an objection of bastardy against the claimant, the claimant is confined to the proof of his legitimacy, whilst the tenant may proceed to the proof of bastardy by excepting, and it will be incumbent that the claimant should show himself to be legitimate in his replication, otherwise he is cast in his cause, and the possession will remain to the tenant. But if on the contrary bastardy is objected by the claimant against the tenant, and that he has no right in the land which he holds, because he is a bastard, it may be answered by the tenant that he is in seysine, as the legitimate heir, whereupon it will be

tebit petentē replicare q̄ bastardus, & sic replicando p̄bare bastardiam, & sic oportet petentem sequi, quia tenens nunquam sequeretur, & sic in utroquè casu incumbit p̄batio replicationis ipsi petenti, vel q̄ p̄bet se legitimum sicut in primo casu, vel quòd tenentem probet bastardum sicut in secundo casu.

7. Quod mittatur inquisitio bastardiæ f. 419. ad curiam Christianitatis per breve.

Cùm igitur in suo casu aliquando transmittēda sit loquela ad curiā Christianitaī in casu licito, modo cōsueto & debito, quia cognitio bastardiæ et inquisitio fieri debeat in curia Christianitatis: tunc fiat b̄re ordinario loci sub hac forma. Ex p̄te regis, infra regnū si ordinarius fuerit sub potestate regis. Si autem extra regnum fuerit ordinarius qui cognoscere debuit & non sub potestate regis, & non teneatur obedire nisi velit, nec inquirere possit nisi fuerit ei demandatū, cadere poterit actio petentis p̄pter defectum p̄bationis. Et notandū q̄, anteq̄m loquela & inquisitio bastardiæ transmittatur ad curiam Christianitatis, oportebit q̄ visus fiat de t̄ra q̃ petitur, quia cùm p̄ inquisitionem sic factam tota causa decidatur, et nihil supersit post inquisitionem nisi judiciū reddendū in curia dn̄i regis, p̄posterè ageretur si tunc primò visus peteretur. Et ideo necesse est q̄ prius fiat visus, ut justic. de re certa certum dare possit judiciū. Et cùm remissa fuerit inquisitio ad ordinariū dn̄o regi,[1] non erit ulterius aliqua exceptio opponenda, p̄ qua minus p̄cedat judicium.

[1] "ab ordinario domino regi," MS. Rawl. C. 159.

necessary for the claimant to reply that he is a bastard, and so in his replication to prove the bastardy, and so it is requisite that the claimant should follow it up, because the tenant should never follow it up ; and so in either case the proof of the replication rests with the claimant either that he should prove himself to be legitimate as in the first case, or that he should prove the tenant to be a bastard as in the second case.

7. That an inquest of bastardy is sent to the court of Christianity by a writ. f. 419.

When therefore in his case the trial is sometimes to be transmitted to the court of Christianity in an allowable case, in the usual and due manner, because the cognisance of bastardy and the inquest ought to be made in the court of Christianity, then let a writ go to the ordinary of the place in this form. On the part of the king, if the ordinary be within the kingdom under the power of the king. But if the ordinary who ought to hold cognisance be outside the kingdom and not under the power of the king, and is not bound to obey unless he is willing, nor can he inquire unless it be committed to him, the action of the claimant may abate on account of the default of proof. And it is to be noted that, before the trial and inquest of bastardy is transmitted to the court of Christianity, it will be requisite that a view should be had of the land which is claimed, because since by an inquest so held the whole cause is decided, and nothing remains after the inquest but to pronounce judgment in the court of the lord the king, it would be a preposterous transaction if then for the first time a view was claimed. And accordingly it is necessary that a view should be first had, that the justiciary may give a certain judgment concerning a certain matter. And when the inquest shall have been remitted by the ordinary[1] to the lord the king, no other exception will be allowed to be made, wherefore the proceedings should not be had to judgment.

[1] The reading in the Rawlinson MS. is required by the context.

8. Forma brevis. Glanville, vii. c. 14.

Rex venerabili in Christo patri A. eadem gratia Londoñ episcopo salutē.[1] Sciatis q̄ cùm A. in curia nostra coram nobis, vel coram justic. nr̄is peteret versus B. tantā tr̄am cum p̄tinentiis in tali villa, idem B. venit in eadem curia coram &c. et objecit eidem A. quod nullum jus habuit in terra illa, eo quod bastardus est, quia natus antequam talis pater ipsius A. desponsavit matrem ipsius A. Et ideo vobis mandamus, quod convocatis coram vobis convocandis, rei veritatem inde diligenter inquiratis, videlicet utrum prædictus A. natus fuit antequam prædictus talis desponsavit talem matrem ipsius A. vel post. Et inquisitionem q̄m inde feceris scire facias nobis vel justiciariis nr̄is talibus per literas vestras patentes. Teste &c. Et cùm in voluntate regis sit trāsmittendi hujusmodi inquisitionem ad curiam Christianitatis vel non, nō dicatur in brevi, & quoniam hujusmodi inquisitio p̄tinet ad forum ecclesiasticū, sicut in aliis causis sequentibus ubi p̄tinet ad forum ecclesiasticum,[2] et non ad forum seculare, et in hoc casu cùm à tenente proponatur exceptio bastardiæ versus petentem, oportebit quòd petens sequatur et probet se legitimū replicando cōtra exceptionem bastardiæ.

9. Oportet quod ille, cui opponitur bastardia, probet se esse legitimum.

Henricus Dei gratia &c. venerabili &c. vel tali officiali salutē. Sciatis q̄ cùm A. de N. in curia nostra coram &c. peteret versus B. et C. uxorem ejus, tantam terram cum pertinentiis in tali villa, p̄ assisam mortis antecessoris inde ibi inter eos sum̄onitam & captam & prædicta C. diceret se esse propinquiorem hæredem D. de cujus morte A. tulit assisam illam, idem A. objecit eidem C. quòd nullum jus habere potuit in terra illa eo quòd bastarda est, quia nata fuit ante-

[1] "Henricus Dei gratia rex "venerabili in Christo patri A. "eadem gratia," MS. Rawl. C. 160.

[2] "sicut in aliis causis sequentibus ubi pertinet ad forum ec- "clesiasticum," omitted, MS. Rawl. C. 160.

8. The form of the writ.

The king to the venerable father in Christ A., by the same grace bishop of London, greeting. Know ye that when A. in our court before us, or before our justiciaries, claimed against B. so much land with its appurtenances in such a vill, the said B. came into our court before &c. and objected to the said A. that he had no right in that land, inasmuch as he is a bastard, because he was born before so-and-so the father of said A. espoused the mother of the said A. And accordingly we command you that, having convoked those persons who ought to be convoked, you should inquire diligently into the truth thereof, to wit, whether the aforesaid A. was born before so-and-so aforesaid espoused the said mother of A. or afterwards. And make known to us or to our justiciaries by your letters patent the inquest which you shall have made thereon. Witness &c. And since it is at the pleasure of the king to transmit an inquest of this kind to the court of Christianity or not, let it not be said in the writ, "and since an inquest of this kind "appertains to the ecclesiastical *forum*," as in the other following cases where it does appertain to the ecclesiastical *forum*, and not to the secular *forum*; and in this case when an exception of bastardy is propounded by the tenant against the claimant, it will be requisite that the claimant follow it up and prove that he is legitimate by a replication against the exception of bastardy.

9. It is requisite that he, to whom bastardy is objected, should prove himself to be legitimate.

Henry by the grace of God &c. to the venerable &c., or to such an official, greeting. Know ye that when A. de N. in our court, before &c., claimed against B. and his wife C. so much land with its appurtenances in such a vill, by an assise of mortdancester summoned thereon at that place and held between them, and the aforesaid C. said that she was a nearer heir to D., concerning whose death A. brought that assise, the said A. objected to the said C. that she could have no right in that land inasmuch as she was a bastard, because she was born before

quàm pater suus desposavit matrem suam, et ideo vobis mandamus &c. ut supra, & in hoc casu quia petens opponit exceptionem bastardiæ versus C. quæ tenet replicando contra eam, quæ dicit se esse legitimam & hæredem & in seysina esse excipiendo, oportebit petentem probare bastardiam replicando illam esse bastardam. Et q̃ dictum est supra de bastardia ejus qui natus est ante sponsalia, idem dici poterit de eo qui natus est post mortem antecessoris sui per tantum tempus, quòd non possit esse verisimile quòd possit esse filius & hæres. Item aliud breve consimile de
f. 419 b. eodem contra tenentem masculum vel fœminam qui natus est de illegitimo matrimonio, sicut de adultera, scilicet ubi quis duas habuerit uxores, unam̃ videlicet de jure et aliā de facto, et ille partus qui de legitimo fuerit in seysinā:[1] & hujusmodi cognitio ad forum pertinet ecclesiasticum et non ad forum seculare.

10. Breve, quod opponitur ei bastardia, qui est in seysina.

Rex tali episcopo salutē. Sciatis q̃ cùm A. peteret versus B. tantam terram cum p̃tinentiis in tali villa ut jus suum, et idē B. veniret in eadē curia, et diceret q̃ fuit in seysina de eadem t̃ra sicut de illa, q̃ ei hæreditariè descendit de quodam C. patre suo, cujus hæres ipse est ut dicit, idem A. objecit eidem B. in eadem curia nr̃a q̃ nihil juris potuit habere in terra illa petita quia bastardus est, & natus de adultera, asserens se esse filium legitimum ipsius C. & hæredem, & quoniam hujusmodi cognitio ad forum pertinet ecclesiasticum, vobis mandamus quòd convocatis convocandis &c. (ut supra). Est etiam alia exceptio bastardiæ, q̃ ad curiam Christianitatis transmittenda est, et non terminanda in curia regia, sive p̃ponatur à petente tenēti, vel à tenente petenti, adjecta tali

[1] "et ille qui partus de legitimo fuerit in seysina," MS. Rawl. C. 160.

her father had espoused her mother, and therefore we command you &c. as above, and in this case because the claimant objects an exception of bastardy against C. who holds the land, in his replication to her, who says that she is legitimate and the heir and by excepting that she is in seysine, it will be requisite that the claimant prove bastardy by replying that she is a bastard. And what is said above concerning the bastardy of him who has been born before espousals, the same may be said of him who has been born after the death of his predecessor at such an interval of time, that it cannot be likely that he can be his son and heir. Likewise another similar writ on the same subject against a male or female tenant who is born of an illegitimate marriage, as of an adulteress to wit, where a person has had two wives, one forsooth of right, the other in fact, and the offspring of the legitimate marriage is in seysine, and the cognisance of such a case appertains to the ecclesiastical *forum*, and not to the secular *forum*. f. 419 b.

10. A writ to object bastardy to him who is in seysine.

The king to such a bishop greeting. Know ye that when A. claimed against B. so much land with its appurtenances in such a vill as his right, and the said B. came into the said court and said that he was in seysine of the said land, as of land which descended to him by inheritance from a certain C. his father, whose heir he is as he says. The said A. objected to the said B. in our said court that he could have no right in the land claimed, because he is a bastard and born of an adulteress, asserting himself to be the legitimate son and the heir of the said C.; and since the cognisance of this matter appertains to the ecclesiastical *forum*, we command you that having convoked the persons who ought to be convoked &c. as above. There is another exception of bastardy, which is to be transmitted to the court of Christianity, and is not to be determined in the king's court, whether it be propounded by a claimant to a tenant or by a tenant to a claimant, with this cause added, that so-and-so the father

causa, q̃ pater talis nunquam desponsavit matrē talis petentis, vel tenentis, et tunc fiat tale bre.

11. Quod pater nunquam desponsavit matrem.

Rex tali episcopo salutē. Sciatis q̃ cū A. in curia nr̃a coram &c. peteret versus B. tantam terram cum ptinentiis in tali villa ut jus suum, idē B. venit in eadē curia et dixit q̃ p̃dictus A. nihil juris clamare poterit in terra illa, quia bastardus est eo q̃ C. pater suus, cujus hæredem se facit, nunquam desponsavit matrem suam. Et quoniam hujusmodi cognitio de tali bastardia objecta ad forum pertinet ecclesiasticum, vobis mandamus q̃ convocatis convocandis coram vobis &c. ut supra. Item si quis crediderit alium esse bastardum, quia natus fuit tempore interdicti, adhibita solennitate quæ tunc potuit adhiberi, sive solennitas fuerit adhibita in facie ecclesiæ, sive non, talis cognitio transmittenda est ad forum ecclesiasticum p tale breve.

12. Breve, quod natus ante matrimonium.

Rex tali episcopo salutē. Sciatis q̃ cùm A. in curia nr̃a &c. peteret versus B. tantū terræ cum ptinentiis in tali villa ut jus suū, idē B. venit in eadē curia et objecit eidē A. q̃ nihil juris inde clamare potuit, quia bastardus est, eo q̃ natus fuit per tantum tempus ante matrimoniū cōtractum solenniter in facie ecclesiæ inter talē patrem ipsius A. & talem matrē ipsius A., responsum fuit à p̃dicto A. q̃ legitimus est, et natus post matrimonium contractū inter patrem et matrem suam tempore interdicti, adhibita omni solēnitate quæ tunc potuit adhiberi. Et quoniā hujusmodi causæ cognitio ut supra.

never espoused the mother of so-and-so the claimant, or of the tenant, and then let a writ of this kind issue.

11. That the father never espoused the mother.

The king to bishop so-and-so greeting. Know ye that when A. in our court &c. claimed against B. so much land with its appurtenances in such a vill as his right, the said B. came into the said court and objected to the said A. that he could claim no right therein, because he was a bastard, inasmuch as his father, whose heir he makes himself out to be, never espoused his mother. And since the cognisance of this matter when such bastardy has been objected belongs to the ecclesiastical *forum*, we command you that having convoked those who ought to be convoked before you &c. as above. Likewise if any one has believed another to be a bastard, because he was born in the time of the interdict, such a solemnity only as was then possible having been adopted, whether that solemnity was adopted in the face of the church or not, the cognisance of such a matter is to be transmitted to the ecclesiastical *forum* by a writ of this kind.

12. A writ, that he was born before marriage.

The king to such a bishop greeting. Know ye that when A. in our court &c. claimed against B. so much land with its appurtenances in such a vill as his right, the said B. came into the said court and objected to the said A. that he could claim no right therein, because he is a bastard, inasmuch as he was born so long a time before marriage was solemnly contracted in the face of the church between so-and-so the father of the said A. and so-and-so the mother of the said A., it was answered by the aforesaid A. that he was legitimate and born after a marriage had been contracted between his father and mother in the time of the interdict, every solemnity that was then possible having been adopted. And since the cognisance of a cause of this kind belongs to the church &c. as above.

13. Cum loquela transmissa fuerit ad curiam Christianitatis, remanebit placitum in curia regis,donec veniat inquisitio.

Cùm autē loquela et hujusmodi inquisitio transmissa fuerit ad curiā Christianitatis, remanebit placitum in curia dñi regis sine die, quousq̃ venerit inquisitio ad curiam, postqm discussum fuerit de bastardia in curia Christianitatis.

14. De officio ordinarii.

Officiū vero ordinarii erit, q̃ cōvocatis p̃tib⁹, in earū p̃sentia si interesse voluerint, fiat diligēs et sum̄aria inquisitio secmndū formā brevis, et si spōsalia vel matrimoniū sint cōtracta, vel ōninò nullū, vel si matrimoniū, tamē illegitimū: vidēdū igit̃ erit de matrimonio de quo supradict̃ est in tractatu, quis hæres sit legitimus, et ubi dicit̃ q̃ hæres est legitimus q̃m justæ nuptiæ demōstrāt, sive clādestinū fuerit matrimoniū sive publicum, sive per verba de p̃senti
f. 420. sive per verba de futuro, sive sub conditione contractū, dum tamen dissolvi nō possit, nec in vita contrahentiū fuerit dissolutum, cùm spōsalia sive matrimonium sit conjunctio maris et fœminę individuam vitæ retinens cōsuetudinem. Et p̃ hoc de facili p̃pendi poterit quis legitimus fuerit & quis bastardus. Cùm autē judex ecclesiasticus inquisitionē fecerit, nō erit ab eo appellandum ab aliquo, nec à petente nec à tenente: à petente nō, quia talē jurisdictionē et talem judicē elegit; à tenente non, quia sic posset causam in infinitū p̃trahere de judice in judicē usq̃ ad papā, et sic posset papa de laico feodo indirecte cognoscere. Itē notandū, q̃ tantū operatur tenentis absentia q̃m

But when the trial and the inquest of this kind has been transmitted to the court of Christianity, the plea shall be stayed in the court of the lord the king without a day, until the inquest has been remitted to the court, after it has been determined respecting the bastardy in the court of Christianity. 13. When the trial has been sent to the court of Christianity, the plea shall be stayed in the court of the king, until the inquest is remitted.

But the office of the ordinary will be, that after the parties have been convened, there be carried on in their presence, if they are willing to take part in it, a diligent and summary inquest according to the form of the writ, and if espousals or marriage has been contracted, or none at all, or an illegitimate marriage, if any, it must be seen concerning the marriage, which has been the subject of discussion in the treatise, who is the legitimate heir, and where it is said, he is the heir whom a legitimate marriage indicates, whether the marriage has been clandestine or public, whether by words *de præsenti*, or by words *de futuro*, or whether contracted under a condition, provided however it cannot be dissolved, nor has been dissolved in the life of the contracting parties, since espousals or marriage is the union of the male and the female retaining an indivisible custom of life. And through these means it may be easily ascertained who is legitimate and who is a bastard. But when the ecclesiastical judge has made an inquest, no appeal from him is to be made by any one, neither by the claimant nor by the tenant: not by the claimant for he has elected such a jurisdiction and such a judge; not by the tenant, for he might so protract the cause to infinity from judge to judge up to the pope, and so the pope might indirectly hold cognisance of a lay fee. Likewise it is to be noted that the absence of the tenant works the same effect as his presence, but from a dele- 14. Concerning the office of the ordinary. f. 420.

p̃sentia, sed â delegato et ab officiali si dicātur errasse vel collusionem fecisse potest appellari ad episcopū, vel aliū ordinariū, quia ordinarius errorē taliū et sententiā poterit revocare vel corrigere, licet nō possit ꝑpriū, nisi cū difficultate. Facta igitur inquisitione secundū q̄ p̃dictū est, cùm pars sequens venerit ad curiā cū inquisitione, statim sum̄oneatur loquela q̃ remāsit sine die & sum̄oneatur tenēs ꝑ hoc br̃e.

15. Facta inquisitione, breve, per quod statim resummoneatur loquela.

Rex vic. salutē. Summoneas ꝑ bonos sum̄onitores B. tenentē q̄ sit coram justic. nr̃is apud talē locū auditurus recordū & judiciū suū de loquela q̃ fuit in eadē curia nr̃a corā &c. inter A. petentē et eundē B. tenentē, de tanta tr̃a cū ꝑtinentiis in tali villa, quā idē A. in eadē curia nr̃a clamat ut jus suū versus eundē B. et unde idem B. dixit q̄ idē A. nullū jus habuit in terra illa eo q̄ bastardus fuit, quia pater suus nunq̄m desponsavit matrem suam, vel alia tali de causa: & unde inquisitio bastardiæ transmissa fuit ad curiā Christianitatis, & habeas ibi sum̄onitores et hoc br̃e. Teste &c.

16. Quod ad diem resummonitionis ꝑoterit esse essoniatus, si voluerit.

Ad primum vero diem sum̄onitionis bene poterunt se essoniare tam petens q̄m tenens si voluerint, simul vel vicissim, quousque habuerint essonium. Si autem ad primum diem vel post essonium tenens defaltam fecerit post resummonitionem, cùm summonitione p̃ventus sit, statim testata summonitione capiatur terra in manum dn̄i regis per defaltam per parvum cape, & tenens ille sum̄oneatur q̄ sit ad alium diem auditurus inde judicium suum. Et ad quem diem sive venerit

gate or an official if he be said to have erred or to have acted collusively there may be an appeal to the bishop or other ordinary, because the ordinary upon the error of such persons may even revoke and correct their sentence, although he cannot his own, except with difficulty. And inquest having been held according to what has been said above, when the party suing has come into the court with the inquest, let the trial be summoned which has been stayed without a day, and let the tenant be summoned by this writ.

15. The inquest having been held, a writ, whereby a trial may be forthwith summoned.

The king to the viscount greeting. Summon by good summoners B. the tenant that he present himself before our justiciaries at such a place in order to hear the record and judgment in his case concerning the trial which was in our said court before &c., between A. the claimant and the said B. the tenant, concerning so much land with its appurtenances in such a vill, which the said A. in our said court claims as his right against the said B., and whereof the said B. alleged that the said A. had no right in the said land inasmuch as he was a bastard, because his father never espoused his mother, or for some other such cause, and whereupon an inquest of bastardy was transmitted to the court of Christianity, and have there the summoners and this writ. Witness &c.

16. That on the day of resummons he may be essoined, if he wishes.

On the first day indeed of the summons the claimant as well as the tenant may essoin themselves, if they wish, at the same time or in turns, until they have had an essoin. But if on the first day or after an essoin the tenant has made default after a resummons, when he has been anticipated by a summons, forthwith upon the summons having been testified let the land be taken into the hands of the lord the king through the default by a little *cape*, and let the said tenant be summoned that he be present on another day to hear the judgment on his case. And on which day whether he come or not,

sive non, amittet seysinam suam per defaltam, sive inquisitio fecerit pro eo sive contra ipsum, nisi docere possit rationem sufficientem quare nō venerit. Si autem summonitione præventus non fuerit, sed malitiosè ante resummonitionē pendente inquisitione cō-tumaciter se transtulerit ad ꝑtes transmarinas & extra regnū absentaverit, ita ꝙ sequi noluerit nec interesse inquisitioni cùm episcopus vel ordinarius justiciariis hoc mandaverit, nihilominùs faciant justic. eū sum̄oneri ac si in regno esset, ꝙ sit auditurus recordū & judicium suū, ut supra. Et ita ꝑcedant quousq̃ talis amiserit ꝑ defaltam: ut de itinere M. de P. in com̃ Norff. de Henry de la Stoke.

17. Quis sit effectus legitimationis, cum probata fuerit.

Effectus vero legitimationis ꝑbatæ hic est, ꝙ cùm semel ꝑbata fuerit & judicium ꝑ tali reddatur in curia regis, semper quoad omnes legitimus erit, nisi in ꝑbatione intervenerit fraus, nō erit itaq̃ ad plures curias Christianitatis trāsmittēd[9], objecta ab aliquo tali exceptiōe, quia si ad diversos mitteret̃ episcopos, possēt cur̃ regiæ cōtraria vel diversa rescribere. Sed fraudulenter posset fieri inquisitio hoc modo, ut si quis plures ĩras vel amplas hæreditates peteret à diversis, ꝑcurare poterit petens ꝑ fraudē ꝙ ab aliquo ipsorū ei opponeretur bastardia, & ita pacisci cū eo, ne quid diceret in testes & cōtra testificata, et sic fraudulenter ꝑbare possit legitimationē, & sic obtinere versus omnes, ꝙ quidē esset iniquum. Itē esto ꝙ quis, cum legitimationē suā ꝑbaverit corā quibuscunq̃ judicibus, anteqm ad curiā venerit cum inquisitione moriatur, si talis

f. 420 b.

he shall lose his seysine through his default, whether the inquest has made for him or against him, unless he can show sufficient cause wherefore he has not come. But if he has not been anticipated by a summons, but maliciously before the resummons pending the inquest has contumaciously transferred himself to parts beyond the sea and has absented himself out of the kingdom, so that he has not been willing to sue or to be present in the inquest when the bishop or the ordinary has remitted it to the justiciaries, nevertheless let the justiciaries cause him to be summoned as if he were in the kingdom, that he be present in order to hear the record and the judgment in his case, as above. And so let them proceed until the said person has lost his suit by his default, as in the iter of Martin de Pateshull in the county of Norfolk concerning Henry de la Stoke.

17. What is the effect of legitimation when it has been proved.

The effect indeed of legitimation having been proved is this, that whenever it has been proved and judgment is rendered for such an one in the courts of the king, he will be always legitimate as regards all persons, unless fraud has intervened in the proof, it will therefore not have to be transmitted to several courts of Christianity, if an exception to such person has been objected by any one, because if it were sent to divers bishops, they might remit to the court of the king contrary or divers reports. But an inquest might be made fraudulently in this f. 420 b. manner, as if any one claimed several lands or ample inheritances from divers persons, the claimant might procure through fraud that bastardy should be objected to him by one of them, and he might bargain with him, that he should allege nothing against his witnesses nor against the matters testified, and so he might fraudulently prove his legitimacy, and so might succeed against all, which would be inequitable. Likewise let it be so that a person, when he has proved his legitimacy before certain justiciaries, dies before he has come into court with the inquest, if such a person has had heirs begotten

hæredes habuerit de carne sua ꝑcreatos, tales habendi sunt ꝑ legitimis, et aliis ꝑferendi in successione, et ex tali inquisitione erit judicium reddendum ꝑ hærede, q̃ ꝑ antecessore redderetur si viveret, quia legitimitas antecessoris ꝑbata, extenditur ad hæredes quoad omnia, videlicet successiones, ordines, et dignitates. Et notandū, q̃ post mortem nō valet talis exceptio ꝑposita contra eum qui mortuus est, cùm ad exceptionem talem respondere non posset, inquiri tamen poterit ꝑ patriam utrum talis fuerit necne, secundum q̃ inquiri poterit utrum quis libere tenuerit, vel in villenagio, licet de statu talis inquiri non potest post mortem, ut de tẽm S. M. anno regis H. vi. incipiente vii.

Cap. XX.

1. Exceptio competens ex persona petentis si fuerit non sanæ mentis, id est, furiosus, et sunt plures peremptoriæ.

Competit etiā exceptio perēptoria tenenti ex ꝑsona petētis, si petēs furiosus fuerit vel nō sanæ mētis q̃ discernere nesciat, vel omninò nullā habeat discretionē. Tales eñ non multū distāt à brutis q̃ ratione carent, nec valere debet q̃ cū talibus agitur durāte furore, possunt enim quidā dilucidis gaudere intervallis, & quidam habent furorem ꝑpetuū. Quod autē actum fuerit cū talibus tēpore quo dilucidis gaudent intervallis, ratū erit ac si cum aliis ageretur, sive furorem simulaverint sive non. Acquirere quidem non poterunt in ipso furore, vel cùm non fuerint sanæ mentis aliqui, quia consentire nō possūt, nec acquisita alienare vel dare, quia alienationi non magis consentire possunt quàm acquisitioni, sed seysinam retinent, quia animum

of his own body, such persons are to be taken to be legitimate and are to be preferred to others in the succession, and from such an inquest judgment will have to be rendered for the heir, which would be rendered for his ancestor if he were living, because the legitimacy of the heir having been proved is extended to his heirs in all matters, to wit, successions, orders, and dignities. And it is to be noted, that such an exception if propounded against one who is dead does not avail after death, since he cannot make an answer to such an exception, an inquest however may be made through the country whether such an one was legitimate or not, according to what may be inquired whether a person has been a free tenant or has held in villenage, although an inquest cannot be held as to his *status* after his death, as in Michaelmas term in the sixth and seventh years of king Henry.

Chapter XX.

A peremptory exception is available to the tenant against the person of the claimant, if the claimant should be a madman or not of sane mind, so that he cannot discern, or has no discretion at all. For such persons do not much differ from brutes who are without reason, nor ought that to avail which is transacted with such persons during their madness, for some may enjoy lucid intervals, and some have perpetual madness. But what has been transacted with such persons at a time when they enjoy lucid intervals, shall be ratified as if it were transacted with others, whether they have simulated madness or not. They cannot acquire whilst they are in a state of madness, or when they are not of sane mind, because they cannot consent, nor alienate nor give their acquisitions, because they can no more consent to the alienation than to the acquisition, but they retain the seysine, because they cannot change the intention,

1. An available exception against the person of the claimant, if he shall be not of sound mind, that is, a madman, and there are several which are peremptory.

mutare non possunt, quem acquirendo dum essent sanæ mentis habuerint, et furor superveniens nihil adimit non magis quàm morbus incurabilis sicut lepra, secundum quod dicitur quòd multa impediunt contrahendo, quæ non dirimunt contractum, & ita sunt multa quæ impediunt ꝑmovendo, quæ non dejiciunt jam promotum. Et talibus de necessitate dandus est tutor vel curator. Sed quid dicendum erit de fatuo: Fatuus quidem acquirere poterit, non tamen in aliquo discretionem habet, & talibus similiter datur curator, nisi autem expresse renunciaverit, quia contra voluntatem expressam non acquirit, sicut contingit coram ipso rege & fratre & hærede Herberti filii Petri, qui publicè renunciavit hereditati, & ita quòd successit ei Reginaldus frater minor. Si autem ita fatuus fuerit, quòd
f. 421. nihil sciat discernêre inter tenemēta nec inter jura, talis nunqm acquirit, quia nō cōsentit. Sed discussio hujusmodi exceptionis discretioni judicis relinquatur.

2. Exceptio ex persona petentis, si fuerit surdus et mutus naturaliter.

Competit autē tenenti exceptio perēptoria ex persona petentis ꝑpter defectū naturæ: ut si quis fuerit surdus & mutus naturaliter, s. q ōnino loqui nō possit nec audire, nō tamē si tardè audiat, vel loqui fuerit aliquātulū īpeditus. Et talis cùm naturaliter surdus fuerit & mutus, acquirere non potest, quia nō potest cōsētire, quia verba stipulātis audire nō potest omninò, et cū ōninò audire non possit nec omnino loqui, voluntatē & cōsensū exprimere nō potest, nec verbis nec signis. Naturaliter dico, hoc est à nativitate, sicut dicitur de cæco, qui cæcus fuit à nativitate, quia si hoc aliter alicui evenerit à casu, inquirendū erit qualis fuerit ante hujusmodi infortuniū, quia, si loqui potuit

which they had, when they were of sane mind, and supervenient madness does not take away anything any more than an incurable disease such as leprosy, according to the saying that many things are impediments to contracting which do not set aside a contract, and so there are many impediments to promotion, which do not cast down a person who has been promoted. And to such persons of necessity a tutor or a curator is to be assigned. But what shall we say of a silly person? A silly person can acquire, he has not however discretion in some things, and to such persons a curator is assigned, unless however he has expressly renounced, because he does not acquire against his express will, as happened before the king and the brother and heir of Herbert Fitz Peter, who publicly renounced his inheritance, and so that Reginald his younger brother succeeded to him. But if he be so silly, that he cannot discern any thing between tenements nor between rights, such a person never acquires, because he does not consent. But the discussion of an exception of this kind should be left to the discretion of the judge. f. 421.

An exception is also available to the tenant of a peremptory nature against the person of the claimant on account of a natural defect, as if a person should be deaf and dumb naturally, to wit, so that he cannot speak nor hear at all, not indeed if he hears slowly or has some slight impediment in speaking. And such a person when he is naturally deaf and dumb, cannot acquire because he cannot consent, for he cannot hear the words of a stipulator at all, and when he cannot hear them at all, nor speak at all, he cannot express his willingness and consent, neither by words nor by signs. I say naturally, that is from birth, as is said of a blind person, who has been blind from his birth, because if this has happened to any one by an accident, it will have to be inquired of what manner he was before such a misfortune, because if he could from the 2 An exception against the person of the claimant, if he be deaf and dumb naturally.

ab initio & audire & cōsentire, ꝑ se & ꝑ ꝑcuratorē acquirit, & acquisita retinet, sed tamen de facili non transfert ad alium acquisita, sed cū surdus et mutus naturaliter acquirere non possit, ꝑ officiū judicis invenienda sunt ei necessaria quoad vixerit ꝑ qualitate ꝑsonæ & hæreditatis quantitate, si hæres esse debuit, & si semel autoritate curatoris acquisierit, si fuerit inde ejectus, recuperabit ꝑ assisam sicut minor.

3. Exceptio propter morbum incurabilem, sicut de leproso.

Datur etiam exceptio tenenti ex ꝑsona petentis peremptoria, ꝑpter morbū petentis incurabilē & corporis deformitatē, ut si petens leprosus fuerit & tam deformis q̄ aspectus eum sustinere non possit, & ita q̄ à cōmunione gentium sit separatus, talis quidē placitare non potest, nec hæreditatē petere: ut de term̄ S. T. añ regis H. xi. in com̄ Hereford de Agnete q̄ fuit uxor Johannis de Westwikam petēte dotē ejus. Hujusmodi vero morbus repellit petentem ab agendo, sed hæreditatem jam habitam non adimit morbus superveniens, sed habendā

4. Exceptio ex cognitione, ubi se cognovit ad villanum.

Datur exceptio tenenti ex ꝑsona petentis peremptoria, ꝑ cōfessionē & cognitionē petentis sive liber sit sive servus, ut si quis in curia dñi regis semel cognoverit se esse villanū, licet liber sit, semper obstabit ei exceptio villenagii, ut supra in pluribus locis: et similiter de itinere M. de P. de loquela q̄ fuerit super judiciū in diversis com̄ añ regis H. iii. in com̄ Dors. de Hamelino filio Radulphi.

beginning speak and hear and consent, he acquires through himself and through an agent, and he retains his acquisitions, but he cannot easily transfer his acquisitions to another person: but since a person who is naturally deaf and dumb cannot acquire, through the office of the judge necessaries are to be found for him as long as he shall live in proportion to his personal quality and the quantity of the inheritance, if he ought to be an heir, and if he has once acquired by the authority of a curator, if he shall have been ejected, he shall recover by an assise as a minor would.

3. An exception on account of an incurable disease as, leprosy.

A peremptory exception is also available to the tenant against the person of the claimant on account of an incurable disease and a personal deformity of the claimant, as if the claimant be a leper and so deformed that the sight of him is insupportable, and such that he has been separated from all communion with mankind, such a person indeed cannot plead nor claim an inheritance, as in Holy Trinity term in the eleventh year of king Henry in the county of Hereford, concerning Agnes, who was the wife of John de Westwikam, claiming her dower. This kind of disease indeed debars a person from bringing an action, but a supervening disease does not take away an inheritance already enjoyed, but only one to be enjoyed.

4. An exception from an acknowledgment, where a person has acknowledged himself to be a villein.

A peremptory exception is also allowed to a tenant against the person of the claimant, whether he be free or a serf, as if any person in the court of the lord the king has once acknowledged himself to be a villein, as above in many places, and in like manner in the iter of Martin de Pateshull in a trial, which took place upon a judgment in different counties in the third year of king Henry in the county of Dorset, concerning Hamelinus the son of Radulphus.

5. Exceptio, si de crimine convictus fuerit de felonia vel aliquis antecessorum.

Datur etiã exceptio tenenti ex ꝑsona petentis perẽptoria, ex crimine & delicto petẽtis, de quo ꝑ judiciũ fuit cõvict^{9} vel utlagat^{9}, vel si ĩrã abjuraverit & postea ꝑ regẽ fuerit restitutus ad pacẽ, & q̃ eodem modo competit tenenti ex ꝑsona antecessorũ petentis, sicut ex ꝑsona sua ꝑpria, ita q̃ hæreditas vel tenementũ petitũ descendere nõ possit ad petentẽ, ut si ipse petens feloniã fecit, pater vel mater, frater vel soror, à quo vel ꝑ q̃m jus descẽdere deberet ad petentẽ, refert tamẽ qualiter quis fuerit utlagat^{9}, & qualiter restitutus, utrũ utlagatus fuerit ꝑ legẽ ĩræ, vel cõtra legem ĩræ & ꝑ volũtatem: et cõtra istã exceptionem respõdere poterit petẽs multis modis, q̃ nõ est secũdũ legẽ ĩræ. Itẽ q̃ nõ in loco debito, sicut in com̃. Itẽ q̃ nõ interrogat^{9} de com̃ in com̃, sed in mercatis et in aliis publicis locis clamat^{9}, vel utlagat^{9} [1] ꝑ br̃e dñi regis & ꝑ solã volũtaĩ dñi regis, ordine juris nõ observato: ut de term̃ S. M. añ regis H. xv. in com̃ Salop de Falcoñ filio W. Et qualiĩ & quãdo talis exceptio
f. 421 b. valere debet videri poterit de placiĩ coronæ de utlagatione utlagatorũ, & eorũ inlagatione, & ad q̃ restituãtur & ad q̃ non.

6. Exceptio per mortem civilem, si quis contulerit se religioni et habitum

Cõpetit exceptio tenenti ex ꝑsona petentis peremptoria, ꝑpter mortẽ civilẽ, ut si quis se religioni cõtulerit, et postea ad seculũ reversus agere velit & hæreditatẽ petere, non audietur. Cùm semel quis se religioni contulerit, renunciat omnibus q̃ seculi sunt, habita distinctione, utrũ habitũ ꝑbationis susceperit,

[1] "clamatus utlagatus," MS. Rawl. C. 160.

A peremptory exception is also allowed to a tenant against the person of the claimant, out of a crime and offence of the claimant, concerning which he has been by a judgment convicted or outlawed, or if he has abjured the land and has been afterwards restored by the king to his peace, and it is allowable in the same manner to the tenant against the person of the ancestors of the claimant just as against his own proper person, so that the inheritance or tenement claimed cannot descend to the claimant, as if the claimant himself has committed a felony, his father or mother, brother or sister, from whom or through whom the right ought to descend to the claimant; it is of importance however in what way a person has been outlawed, and in what way restored, and whether he has been outlawed through the law of the land or against the law of the land and arbitrarily; and against this exception the claimant may answer in many ways that it is not in accordance with the law of the land. Likewise that it was not in a due place as in a county. Likewise that he was not sought after from county to county, but was proclaimed in markets and other public places, or was outlawed by a writ of the king and by the sole pleasure of the king, the order of law not having been observed, as in Michaelmas term in the fifteenth year of king Henry in the county of Salop, concerning Fulk the son of W., and in what way and when an exception ought to avail may be seen amongst the pleas of the crown concerning the outlawry of outlaws and their inlawry, and to what things they are restored and to what things not.

5. An exception, if he or one of his ancestors have been convicted of the crime of felony.

f. 421 b.

A peremptory objection is available to a tenant against the person of a claimant, as if a person has entered into religion, and afterwards, having returned to the world, wishes to proceed and to claim an inheritance, he shall not be heard. When a person has once entered into religion he renounces every thing which is of the world, a distinction being observed whether he has adopted the

6. An exception through a civil death, if a person has entered into religion, and has ad-

religionis susceperit.

vel habitū ꝑfessionis, & cùm sic objecta fuerit hujusmodi talis exceptio, inquisitio curiæ Christianitatis demandabitur facienda, cū contra exceptionē talem fuerit replicatū, et secundū illā inquisitionē in foro seculari erit judicādū, sicut cōtigit de W. Burdō de Deseburgh, qui uxorē duxit quandā, postꝙm effecta fuit monialis. Est etiā mors civilis in servo in servitute sub potestate dñi cōstituto. Hujusmodi vero servitus mortalitati cōparatur, quia fuit aliquādo in manu dñi vita et mors, sed modo nō, ꝑpter severitatem dominorū, sed in manu dñi regis, sed cùm tales potestatem dñi sui effugerint, quasi resuscitati ad vitam aliquātulum respirant, secundum ꝙ superius ꝑpendi poterit de exceptione servitutis.

Cap. XXI.

1. De exceptionibus, quæ competunt ex persona petentis et quæ peremptoriæ sunt, sicut de minori ætate.

Dictum est in ꝓximo superius de exceptionibus q̃ cōpetūt tenēti ex ꝑsona petentis, & q̃ perēptoriæ sunt ꝑpetuæ: nunc autē dicendū est de exceptionib[9] q̃ cōpetunt eidē ex ꝑsona ejusdē, q̃ dilatoriæ sunt & tēporales. Et inprimis de illa q̃ petēti opponitur, qui ante tēpus agere nō potest eo ꝙ est minor & infra ætatē, maximè in causa ꝓprietatis, nec etiam cōveniri, qua objecta, si cōstiterit ipsū esse minorē, differtur actio quousq̃ major effect[9] fuerit, sed non cadit bñe, sed resum̄oneatur loquela cū ꝓvenerit ad ætatē, nisi forte talis sit actio ad ꝙm infra ætatē respondere teneatur. Et quoniā diversæ sunt ætates et diversi-

habit of probation or the habit of profession, and when an exception of this kind has been objected, an inquest will have to be committed to the court of Christianity to be held by it, when a replication has been made against such an exception, and according to that inquest it will have to be adjudged in the secular *forum*, as happened concerning William Burdon of Deseburgh, who married for his wife a woman after she had become a nun. There is likewise civil death in the case of a serf established in servitude under the power of a lord. But this kind of servitude is compared to mortality, for once on a time life and death were in the hand of the lord, but now not so, on account of the severity of the lords, but in the hand of the lord the king; when such persons however have escaped from the power of their lord they breathe a little, as if they had been resuscitated to life, according to what may be ascertained above under the exception of servitude.

opted the religious habit.

Chapter XXI.

We have spoken in the next chapter above concerning exceptions, which are available to the tenant against the person of the claimant and which are peremptory and perpetual: now indeed we must speak of exceptions which are available to the tenant against the person of the claimant, which are dilatory and temporary. And in the first place of that which is objected to the claimant, who cannot bring an action before a certain time inasmuch as he is a minor and under age, especially in a cause of property, nor can he be convened, which having been objected, if it has been established that he is a minor, the action is adjourned until he has attained his majority, but the writ does not abate, but let a resummons for the trial be issued when he has come of age, unless the action be of such a character that he is bound to make answer to it under age. And since

1. Of exceptions, which are available against the person of the claimant and which are peremptory, as concerning minority.

modè judicādæ secūdū diversitatē actionū, ꝑsonarū & tenementorū, ideo de ætatib⁹ qualiter inter se differāt videam⁹: sed de hac materia & differentia ætatū dicitur in ꝑte supra in tractatu de custodia minorū qui esse debent sub custodia et cura dominorū & ꝑ quantum tēpus. Sed quoniā minor quandoq̃ infra minorem ætatē agere poterit & cōvenire majorem, & quādoq̃ cùm fuerit in seysina tenetur respondere infra minorem ætatem in quibusdā casibus tam minori qm majori, in quibusdā autem nec majori nec minori ante plenā ætatem, videndū inprimis ī quib⁹ casibus infra ætatem agere possit & petere, & quæ, & qua actione.
f. 422. Et sciendū q̄ in qualibet ætate petere poterit seysinā ꝑpriā, si fuerit disseysitus, ꝑ assisam novæ disseysinæ, quandocunq̃ & qualitercunq̃ fuerit disseysitus. Itē seysinā antecessorū cujuscūq̃ ꝑ assisam mortis antecessoris, sed cum ita recuperaverit, nō respondebit inde ante plenā ætatē ad aliquod bŕe impetratū super possessione vel ꝑprietate, sed liberū socagiū petere nō poterit ante tēpus de seysina antecessoris ꝑ bŕe de recto, ante ætatem xiv. annorū, non magis qm feodū militare anteqm effect⁹ fuerit ætatis xxi. anni, hoc est anteqm īpleverit xxi. annū et xxii. attigerit. Et cū sic ꝑ bŕe de recto seysinā ꝑpriā recuperaverit de socagio, inde non respondebit ante plenā ætatē, nec de feodo militari, nec minori nec majori. Itē nec feodū militare petere poterit ante tempus p̃finitū, sed tūc cùm recuperaverit ꝑ breve de recto & major effect⁹ fuerit, respondebit inde cuilibet majori cùm fuerit im-

ages are divers and are to be judged in divers ways according to the diversity of the actions, the persons, and the tenements, therefore let us see concerning the ages in what manner they differ from one another: but concerning this matter and the difference of ages it has been partly discussed above in the treatise concerning the custody of minors, who ought to be under the custody and care of their lords, and for what length of time. But since a minor may sometimes bring an action whilst under age and may convene a person of full age, and sometimes when he is in seysine he is bound to answer whilst within minority in certain cases as well to a minor as to a person of full age, but in certain cases neither to a person of full age nor to a minor before full age, we must see in the first place in what cases he may bring an action and make a claim, when under age, and what things, and by what action. And it is to be known that at any age he may claim his own f. 422.
seysine, if he has been disseysed, by an assise of novel disseysine, at whatever time and in whatever manner he may have been disseysed. Likewise the seysine of any of his ancestors by an assise of mortdancester, but when he has so recovered it, he shall not answer thereon before full age to any writ sued out concerning the property or the possession, but he cannot claim before a given time a free socage tenement from the seysine of an ancestor, by a writ of right, before the age of fourteen years, no more than a military fief before he is twenty-one years of age, that is before he has completed twenty-one years and has reached the twenty-second. And when he has thus by a writ of right recovered his own seysine of a socage tenement, he shall not answer thereon before he is of full age, nor concerning a military fief, neither to a minor nor to a person of full age. Likewise he cannot claim a military fief before a definite time, but then when he has recovered it by a writ of right and has become of full age, he shall answer thereon

placitatus, minori tamē non nisi in causa possessionis. Sed esto q̄ ipse minor vel custos suus alienaverit, q̃ritur an minor ante ætatē possit revocare factū p̄priū vel custodis? videtur q̄ factū p̄priū revocare nō possit ante ætatē, quia cùm ad ætatē p̄venerit ratificare poterit donū suū & facere validū, q̄ ab initio non valuit. Eodē modo nec factū custodis sui, cùm alienatio illa non multū noceat minori ante ætatē, & tūc recuperare suū habebit p̄ breve de ingressu, nisi sit qui dicat q̄ facta alienatione statim possit minor per assisam novæ disseysinæ infra ætatē sibi p̄videre. Si autē plures sint minores non p̄ticipes qui in causa possessionis petant unicam rem versus eundē majorē, non possunt simul agere nec simul recuperare, sed semper de ultima seysina erit judicandū, ut supra in tractatu de assisa mortis antecessoris plenius.

2. De quibus minor ante ætatem debeat respondere, et de quibus non.

Cū autē minor fuerit in seysina, videndum de quib⁹ teneatur respondere infra ætatem, et de quibus non. Et sciendū q̄ respondere tenetur, non obstāte ætate, majori in omni casu tam super p̄prietate q̄m super possessione, & minori in causa possessionis, si fuerit feoffatus in minori ætate, et fere omnia habebit remedia in exceptionibus et essoniis tam de malo veniēdi q̃m de malo, lecti, & in warranti vocatione, p̃terq̄m in hoc q̄ attornatū facere non possit. Et si hoc, sequitur q̄ essoniū de malo lecti habere non poterit, ut si languor ei fuerit adjudicatus & post languorē venire non possit, responsalē pro eo mittere non poterit non

to any one of full age whenever he shall be impleaded, but to a minor not unless in a cause of possession. But let it be that a minor himself or his curator has alienated a tenement, it is asked whether a minor can revoke the act of himself or of his guardian before he is of full age, it seems that he cannot revoke his own act before he is of full age, because when he has attained his full age he can ratify his gift and make it valid which was not valid before. In the same manner he cannot revoke the act of his guardian, since that alienation does not much hurt the minor before he is of age, and then he may recover his own by a writ of entry, unless there be some one who says, that upon the alienation having been made the minor may forthwith provide for himself by an assise of novel disseysine whilst under age. But if there be several minors not coparceners, who in a cause of possession claim a single thing against the same major, they cannot bring an action simultaneously nor recover simultaneously, but judgment will always have to be made concerning the last seysine, as above in the treatise concerning an assise of mortdancester has been more fully stated.

2. Concerning what things a minor ought to answer when under age, and concerning what things not.

But when a minor is in seysine, it is to be seen concerning what things he is bound to answer whilst under age, and concerning what things not so. And it is to be known that he is bound to answer, notwithstanding his age, to a major in every case as well upon property as upon possession, and to a minor in a cause of possession if he has been enfeoffed during his minority, and he shall have almost every remedy in exceptions and in essoins as well for sickness on the way as for sickness in bed, and in the vouching of a warrantor, except that he cannot appoint an attorney. And if he does this, it follows that he cannot have an essoin for bed-sickness, as if languor has been adjudged to him and after his languor he cannot come, he cannot send a person to answer for him any more than appoint an attorney.

magis qm facere attornatū. Respondebit etiā in minori ætate de facto suo & injuria sua ꝑpria, tā in causa criminali qm civili, dū tamē civiliter agatur: ut si minor disseysinā fecerit, ad assisam novæ disseysinæ respōdebit. Respōdebit etiā non obstāte minori ætate mulieri dotē petēti ꝑpter favorē dotis. Fallit tamē in casu speciali, scilicet ubi avus alicuj⁹ minoris dotavit uxorē suam & ipsa mortuo viro suo dotem non
Cf. fol. 45 b. petiit ꝑ longum tempus, scilicet, x. xx. vel xxx. annos in vita hæredis viri sui, & mortuo hærede illo ante assignationē dotis, hærede suo infra ætatē relicto, si mulier tūc petere poterit ex causa dotis, talis hæres non ita respōdebit ei ante ætatē suam, sed obstabit ei exceptio minoris ætatis usq̄ ad ætatem hæredis, et eo q ꝑ tantū tēpus tacuit, p̄sumi poterit q inter ipsā & heredem antecessoris intervenit pactum
f. 422 b. de non petendo, vel quòd remisit, & hujusm̄. Item respondebit infra ætatē aliquando si res tangat ipsum regē, quia infra ætatē inquiri poterit, salvo jure minoris & salvo jure cujuslibet, utrum antecessor hæredis qui rem tenuit obiit inde seysitus ut de feodo vel non, sicut de Wilhelmo Lungesper comite Sarum & Elena uxore ejus q̄ fuit infra ætatē, & ubi facta fuit inquisitio de castro Sarū corā Simone de Pateshul & sociis ejus, utrū castrū illud cū com̄ ꝑtineret ad regē scilicet vel ad p̄dictū Wilhelm̄ ratione Elenæ uxoris ejus, & ubi rex Henr̄ postmodū retinuit ꝑ p̄dictam inquisitionē. Itē respōdebit minor ad finem factū nō obstāte ætatē, si implacitetur. Si autem alius fuerit implacitatus & ꝑ finem factum minorem vocaverit ad

He shall answer also during his minority concerning his own act and any injury committed by him as well in a criminal as in a civil cause, provided however the proceedings are of a civil nature, as if a minor has made a disseysine, he shall answer to an assise of novel disseysine. He shall answer also notwithstanding his minority to a woman claiming her dower on account of the favour shown to dower. It fails however in a special case, to wit, where the grandfather of a minor has endowed his wife, and she after the death of her husband has not claimed dower for a long time, to wit, ten, twenty, or thirty years in the lifetime of the heir of her husband, and upon the death of that heir before the assignment of dower, his heir having been left a minor, if the wife then can claim on account of dower, such an heir shall not answer to her before he is of age, but the exception of minority shall be an obstacle to her until the full age of the heir, and inasmuch as she has been silent so long, it may be presumed that between herself and the heir of the ancestor there was an agreement not to claim, or that she released it and such like. Likewise he shall answer under age sometimes, f. 422 b.
if the matter touches the king, because an inquest may be made, saving the right of the minor and saving the right of everybody, whether the ancestor of the heir who held the property died seysed of it as of fee or not, as concerning William Lungesper in the county of Sarum and Elena his wife who was under age, and where an inquest was held concerning the castle of Sarum before Simon de Pateshull and his associates, whether that castle with the county belonged to the king forsooth, or to the aforesaid William by reason of Elena his wife, and where king Henry afterwards retained it through the aforesaid inquest. Likewise a minor shall answer to a fine made notwithstanding his age, if he be impleaded. But if another has been impleaded and through making a fine has called a minor to warrant,

warrantū, in placito warrantiæ respondebit ꝑpter finē factum, sed cùm warrantizaverit petenti non respondebit in principali placito ante ætatem: ut ꝑbatur de term̃ S. Michaelis anno regni regis Henr̃ xv. incipiente xvi. in com̃ Essex de Alicia, quæ fuit uxor Lucæ Brokenhed. Ad idem facit in rotulo de term̃ S. M. anno regis H. xvi. incipiente xvii. in com̃ Suff., de Juliana, quæ fuit uxor Alani de Giseham. Item infra ætatem respōdebit petenti ad assisam mortis antecessoris et ad alia brevia & ad alia placita, sive res corporalis sive jura petantur, de omni de quo antecessor minoris non obiit seysitus in dominico ut de feodo. Itē si minor in minori ætate amiserit ꝑ assisam in placito possessionis, sicut ꝑ assisam mortis antecessoris, recuperabit major factus ꝑ breve de recto in placito ꝑprietatis. Itē infra ætatē respondebit minor tam de facto alieno quàm ꝑprio quoad restitutionē, licet non quoad pœnam, si pater vel alius antecessor suus (cujus hæres ipse fuerit) disseysinam fecerit, cùm immediate succedat in rem vitiosam, si contra ipsum agatur post mortē antecessoris per breve de ingressu. Quia vice versa de nullo respondebit, de quo antecessor minoris in seysina obiit seysitus in dominico suo ut de feodo. Item infra ætatem respondebit quandoq̃ ex obligatione antecessorum facta in curia dñi regis de consilio curiæ, ut si antecessor obligavit se ad respondendū alicui certo die vel hæredes suos, sive fuerit plenæ ætatis sive infra ætatē, si de eo humanitùs cōtigerit, sicut de hæredibus Johannis de Monumew versus regem. Minor etiā cùm placitatus fuerit ante ætatē non respō-

he shall answer in the plea of warranty on account of a fine having been made, but when he has warranted to the claimant he shall not answer in the principal plea before he is of full age, as is proved in St. Michael's term in the fifteenth and sixteenth years of the reign of king Henry in the county of Essex, concerning Alice, who was the wife of Luke Brokenhed. To the same effect is a case in the roll of St. Michael's term in the sixteenth and seventeenth years of king Henry in the county of Suffolk, concerning Juliana, who was the wife of Alan de Giseham. Likewise he shall answer whilst under age to a claimant in an assise of mortdancester and to other writs and to other pleas whether corporeal things or rights are claimed, concerning the whole of which the ancestor of the minor did not die seysed in domain as of fee. Likewise if a minor in his minority has lost through an assise in a plea of possession as through an assise of mortdancester, he shall recover when he has come of age by a writ of right in a cause of property. Likewise a minor shall answer when under age as well concerning another's act as concerning his own, as regards restitution, although not as regards a penalty, if his father or some other ancestor (whose heir he may be) has caused a disseysine, since he immediately succeeds to a vicious title, if an action be brought against him after the death of his ancestor by a writ of entry. Because conversely he shall answer for nothing, in seysine of which the ancestor of the minor died seysed in his own domain as of fee. Likewise he shall answer when he is under age at any time upon an obligation of his ancestors made in the court of the lord the king upon a resolution of the court, as if an ancestor has obliged himself or his heirs to answer to a certain person on a certain day whether he shall be of full age or under age, if he should go the way of all flesh, as in the case of the heirs of John de Monumew against the king. A minor likewise when he shall be impleaded before full

debit de aliquo, de quo antecessor suus (cujus hæres ipse est) obiit seysitus ut de feodo, & quia (ut prædictum est) quandoq̃ tenetur respondere infra ætatem & quandoq̃ non, ideo sine p̃judicio suo fieri poterit inquisitio infra ætatem; utrū antecessor seysitus obiit ut de feodo sibi & hæredibus suis, vel tantū ad terminū vitæ vel annorū, vel ut de vadio vel in custodia vel hujusmodi, ut de W. Lungesper. Et si forte infra ætatem de hujusmodi arctatus fuerit ad respondendum, succurritur ei p̱ tale, breve ne respondeat ante ætatem, quia status minoris mutari non debet. Et facta sic inquisitione aut remanebit placitum aut procedet. Rex vicecomiti salutē. Precipimus tibi quòd non implacites vel implacitari permittas talē, qui est infra ætatē (ut dicitur), de libero tenemento suo in tali villa, donec idem talis talis sit ætatis, q̱ possit & debeat secundum legem & consuetudiñ Angliæ de tenemento respondere.
f. 423. T. &c. Item si aliquis minor[1] vocaverit ad warrantū in com̃, ne tenens cogatur petenti in principali placito respondere, vel ne ulterius p̱cedat in principali ante ætatē fiat ei tale breve.

3. Breve, ne minor respondeat infra ætatem de libero tenemento suo donec sit talis ætatis.

Rex vic. saluť. Præcipim[9] tibi q̱ nō p̱mittas q̱ A. implacitet B. de tanta terra cū p̱tinentiis in tali villa, unde idē A. trahit ad warrantū C. qui est infra ætatē & warrant[9] ejus esse debet ut dicit, donec idem C. sit talis plenæ ætatis, q̱ possit et debeat secundū legē & cōsuetudinē Angliæ terram warrantizare. Et hoc locum habet si minor in com̃ vocetur ad warrantū. Et cū minor non teneatur respondere de aliquo, de quo ante-

[1] "minorem," MS. Rawl. C. 160.

age shall not answer concerning anything, concerning which his ancestor (whose heir he is) has died seysed as of fee, and because (as said above) he is sometimes bound to answer under age and sometimes not, therefore without prejudice to him an inquest may be held whilst he is under age, whether his ancestor died seysed [of a tenement] as of fee for himself and his heirs, or only for the term of his life or a term of years, or as a security or by right of guardianship or such like, as in the case of W. Lungesper. And if by chance whilst under age he be constrained to answer to such like questions, he is succoured by a writ of this kind, that he shall not answer before he is of age, because the *status* of a minor ought not to be changed. And the inquest having been so made either the plea shall be stayed or it shall proceed. The king to the viscount greeting. We enjoin you that you do not implead or allow to be impleaded so-and-so, who is under age (as it is said), concerning his free tenement in such a vill, until the said so-and-so is of such an age, that he can and ought to answer concerning the tenement according to the law and custom of England. Witness, &c. Likewise if any one has vouched a minor to warrant in a county court, let a writ of this kind issue to him, that the tenant shall not be compelled to answer to the claimant in the principal plea, or that he shall not proceed further in the principal plea before he is of age. f. 423.

3. A writ that a minor shall not answer under age concerning his freehold until he be of such an age.

The king to the viscount, health. We enjoin you that you do not permit that A. should implead B. concerning so much land with its appurtenances in such a vill, whereof the said A. vouches as a warrantor C., who is under age and ought to be his warrantor, as he says, until C. be of such full age that he can and ought according to the custom of England to warrant the land. And this has place if a minor should be vouched in a county to warrant. And since a minor is not found to answer concerning any tenements of which his ancestor

cessor suus seysitus obierit ut de feodo, à cõtrario sensu videtur q̃ respõdere debeat de omni, de quo antecessor suus non obiit seysitus ut de feodo, facta prius inquisitione, sive res corporales petãtur sive jura. Seysiri autẽ poterit quis de re corporali in qua jus habet, sive de jure ad rẽ vel ad p̃sonam p̃tinente. Et unde si de re corporali agatur et fuerit seysitus añ et die quo fuerit vivus et mortuus, locũ habet q̃ dicitur. Si autẽ jura sint, et in seysina fuerit añ & die quo moriebatur, licet non fuerit usus añ & die quo moritur, dũ tamẽ nõ sit deusus, hoc est, q̃ non amittat p̃ non usũ, sicut dici poterit de servitutibus, de pastu pecoris, et aliis cõsimilibus.

4. Si plures sunt hæredes, quorum quidam infra ætatem et quidam non.

Itẽ cùm nullus teneatur respõdere ante plenã ætatẽ, tamẽ si plures sint unũ jus habẽtes quasi unũ corpus, licet plures sũt plenæ ætatis & unus vel duo infra, illi qui plenæ ætatis sunt exceptionẽ dilatoriam habebũt ex p̃sona taliũ quousq̃ omnes plenã ætatẽ habuerint, et sic exceptionẽ cõsequantur ex personis aliorũ, q̃m ex p̃sonis p̃priis non habebunt. Et q̃ dicitur de tenente, dici poterit de petente, ut si tenẽs sine p̃ticipibus suis qui sunt infra ætatẽ respondere non teneatur, vice versa tenenti à petente sine p̃ticipibus non debet respõderi, ut infra dicetur plenius de p̃ticipibus.

5. Exceptio ratione adjuncti sicut de

Itẽ exceptionẽ poterit habere quis ratione adjuncti, q̃ ex se ipso habere nõ poterit, sicut inter virum et uxorẽ, ut si vir plenæ ętatis existens ducat in uxorẽ aliquã cum hæreditate q̃ fuerit infra ætatẽ, et implaci-

died seysed as of fee, in a contrary sense it seems that he ought to answer concerning everything of which his ancestor did not die seysed as of fee, an inquest having first been held, whether corporeal things or rights are claimed. But a person may be seysed of a corporeal thing in which he has a right, whether of right pertaining to the thing or to the person. And hence if the action be concerning a corporeal thing and he has been seysed in the year and on the day on which he was living and died, what is said has place. But if there are rights and he has been in seysine in the year and on the day on which he died, although he did not use them in the year and on the day on which he died, provided however he had not disused them, that is that he does not lose them on account of non-user, as may be said of servitudes, of the pasture of sheep, and other like things.

4. If there be several heirs, of which some are under age, and some not.

Likewise, since no one is bound to answer before full age, nevertheless if there be several who have one right as if one body, although several be of full age and one or two below it, those who are of full age shall have a dilatory exception founded on the person of the said minors until all shall attain to full age, and so they shall obtain an exception founded on the personal status of the others, which they shall not have founded on their own personal status. And what is said of a tenant may also be said of a claimant, as if a tenant is not bound to answer without his coparceners who are under age; conversely the claimant is not bound to answer without his coparceners to the tenant, as will be explained below more fully concerning coparceners.

5. An exception by reason of an adjunct person, as concerning

Likewise a person may have an exception by reason of an adjunct person, which he would not have of himself, as between husband and wife, as if the husband, being of full age, should take to wife some one with an inheritance who was under age, and they should be im-

participe et uxore.

tati fuerint de re uxoria ꝑpter minorē ætatem uxoris remanebit loquela sine die, quousq̄ uxor (de cujus jure agitur) effecta fuerit plenæ ætatis. Si autē vir tenēs fuerit infra ætatem, & uxor plenæ ætatis, cum implacitati fuerint, nō remanebit loquela sine die ꝑpter minorē ætatem viri, sive nupta sit ante impetrationē brevis vel post, quia mulier implacitata de jure suo si ꝑpter minorem ætatem viri posset differre juditiū, ita posset q̄libet mulier in fraudē nubere viro minori cū ꝑticipes haberet vel non, q̄ esset iniquum, et sive hæreditas ꝑtita esset sive nō. Et idē dici poterit si qua mulier nuberet villano, cùm fraus talibus patrocinari non debeat. Et de hac materia inveniri poterit, s. de uxore majoris ætatis et viro minoris, in rotulo de term̄ S. H. apud West. añ regis H. xv. in com̄ North., de W. Lungesper minore & Idonea uxore ejus majore.

6. Si mulier cum hæreditate nupta fuerit minori vel e contrario.

f. 423 b.

Si autē vir & uxor, vel è contrario[1] hæreditatē et rem uxoriā simul petāt, quorū unus eorū sit infra ętatem, si vir plenæ ætatis fuerit & uxor infra, sive ante bŕe impetratum sive post contraxerint, remanebit loquela sine die usq̄ ad ętatem uxoris q̄ fuerit infra ætatē, et hoc si nupserit ante bŕe impetratum. Si autem post, cadit omnino bŕe si tenens voluerit, vel differtur actio usq̄ ad ætatem uxoris, de cujus jure agitur. Si vero maritus fuerit infra ætatē et uxor plenæ ætatis, non remanebit loquela ꝑpter minorē ætatē viri (ut supra) si cōtraxerint ante bŕe. Si autē minor petat contra minorē, vel major cōtra majorē,

[1] "vel e contrario," omitted MS. Rawl. C. 160.

pleaded concerning a tenement of the wife's, on account of the minority of the wife the trial shall be stayed without a day, until the wife, whose right should be at stake, has attained full age. But if the tenant husband should be under age and his wife should be of full age when they have been impleaded, the trial shall not be stayed without a day on account of the minority of the husband, whether she has been married before the suing out of the writ or after it, because a woman who is impleaded concerning her own right, if she could delay the judgment on account of the minority of her husband, any woman could so fraudulently marry a minor when she had coparceners or not, which would be inequitable, and whether her inheritance was claimed or not. And the same thing may be said if any woman married a villein, since fraud ought not to protect such persons. And on this subject a judgment will be found, namely, concerning a wife of full age and a husband in his minority, in the roll of St. Hilary's term at Westminster, in the fifteenth year of the reign of king Henry, in the county of Northampton, concerning William Lungesper a minor, and Idonea his wife of full age.

a coparcener and a wife.

But if a husband and wife, or contrariwise, claim simultaneously the inheritance and estate of the wife, one of whom shall be under age, if the husband be of full age and the wife under age, whether they have contracted marriage before the writ was sued out or after it, the trial shall be stayed without a day until the majority of the wife who shall be under age, and this if she shall have married before the writ was sued out. But if after, the writ falls altogether if the tenant chooses, or the action is deferred until the wife, whose right is at stake, is of full age. But if the husband be under age and the wife of full age, the trial shall not be stayed (as above) on account of the minority of the husband, if they have contracted marriage before the writ. But if a minor claims against a minor, or a major against a

6. If a woman with an inheritance has been married to a minor or the converse.

f. 423 b.

vel è cōtrariò in causa possessionis, quid fieri debeat satis dictum est supra in tractatu de ass. moꝛ ātec. Si autē in causa ꝓprietatis, nec petēs petere poterit, nec tenēs tenebiꝫ ei respondere, sive petēs major fuerit sive minor āte plenā ætatē.

7. Status minoris mutari non debet, nec de tenementis nec de servitio et consuetudinibus.

Status enim minoris mutari nō debet nō magis de servitio & cōsuetudine qm de tenemēto, ut si de minori petātur servitia & cōsuetudines, de quib⁹ pater vel alius antecessor suus quietanciā habuit añ et die quo fuit vivus & mortuus, minor ante ætatē petēti nō respōdebit. Itē nec mutari debet status suus, ut si servitia & cōsuetudines debitæ exigātur à minore, & pater vel alius antecessor illa fecerit alii dño capitali, qm ei qui nunc petit, añ et die quo fuit vivus et mortu⁹, minor petēti nō respōdebit ante ætatē, quia ab eo cui antecessor solvit recedere nō potest ante ætatē: & sic nō mutatur status minoris ante ætatē, sive sit tenemētū, sive servitiū, sive libertas, sive quid tale; dum tamē ꝑ inquisitionē cōstiterit de veritate, cū tali ꝓtestatione, q salvū sit jus minoris cùm ad ætatē ꝓvenerit, nō obstantib⁹ chartis vel instrumentis antecessorū in cōtrariū faciētib⁹, cū minor ad chartas infra ætatē respōdere non possit, ut si custos nomine minoris cōsuetudines & servicia petat de quibus pater vel alius antecessor minoris seysit⁹ obiit, licet tenētes chartas sufficiētes vel alia instrumēta ostenderint, q aliter tenere debeant & ꝑ alia servitia, ꝑ seysina antecessoris & ꝑ minore judicabitur, quia ad chartas respondere nō potest. Et vice versa, si minor indebita petat servitia & cōsuetudines, & tenentes sui quie-

major, or contrariwise in a cause of possession, what ought to be done has been sufficiently explained in an assise of mortdancester. But if in a cause of property, neither the claimant can claim nor shall the tenant be obliged to answer to him, whether the claimant be in his majority or minority, before he is of full age.

7. The *status* of a minor ought not to be changed, neither concerning tenements nor concerning service or customs.

For the *status* of a minor ought not to be changed concerning a service or a custom any more than concerning a tenement, as if services or customs are claimed from a minor concerning which his father or other ancestor had an acquittance in the year and on the day on which he was alive and dead, the minor before he is of age shall not answer to the claimant. Likewise, neither ought his *status* to be changed, as if due services and customs be required from a minor, and his father or other ancestor has done them to another chief lord than to him, who now claims, in the year and on the day on which he was alive and dead, the minor shall not answer to the claimant before he is of age, because he cannot before he is of age withdraw himself from him to whom his ancestor paid them: and thus the *status* of the minor is not changed before he is of age, whether it be a tenement, or a service, or a franchise, or something of that kind, provided however it be ascertained concerning the truth by an inquest, with a protest of this kind that the right of the minor shall be preserved when he comes of age, notwithstanding charters or instruments of his ancestors making to the contrary, since a minor cannot answer to charters whilst he is under age, as if a guardian in the name of a minor claims customs and services, of which the father or other ancestor of the minor died seysed, although the tenants exhibit sufficient charters and other instruments, that they ought to hold otherwise and by other services, judgment shall be given for the seysine of the ancestor and for the minor, because he cannot answer to the charters. And conversely, if the minor claims undue services and customs, and the tenants

tanciā allegaverint q̄ die & añ &c. ante ætatē minoris nō respōdebit. Eodē modo si dñus capitalis minoris indebita servitia, consuetudines et incōsuetas petat à minore.[1] Idē etiā erit q̄ status minoris mutari nō debet, ut si pater vel alius antecessor minoris aliq̄m tenentē suum acquietaverit de servitio illo versus superiores dominos capitales anno, die &c. ille minor eundē sine aliqua conditione acquietabit. Quod quidē dici poterit de illo qui terrā aliquam dederit alicui domui religiosæ in liberam, puram et ppetuam eleemosynam, si abbas vel prior distringatur pro aliquo servitio forinseco vel alio, si anno & die, quo antecessor minoris donator obiit, fuit talis q̄rens in seysina de acquietancia, ita q̄ antecessor minoris eum acquietaverit, hæres quamvis minor eum acquietabit: ut de term̄ S. Michaelis anno regni regis Henrici nono incipiente decimo in comitatu Kanc. de priore de Merton & Nigello de Mumbrey. Et idem erit licet warrant° nihil solverit nec acquietaverit, cùm à capitali dño anno & die nihil sit petitum. Itē si de maritagio alicujus vel de alia re agatur, unde minor vocatus fuerit ad warrantū, si anno et die quo antecessor minoris fuit vivus & mortuus, fuit idē antecessor seysitus de maritagio illo, minori infra ætatē respōdebitur: ut de term̄ S. Michaelis anno regni regis H. nono incipiente decimo in com̄ Eborū de W. de Carleton & R. de Percy. Item casus de minore
f. 424. quod si quis pepigerit cum dño capitali ne hæres suus sit in custodia cùm fuerit infra ætatē, vel ne releviū det cùm plenam ætatē habuerit, & talis dominus capitalis superiorē capitalē habeat dominū, si

[1] "indebita servitia et inconsueta petat a minore," MS. Rawl. C. 160.

allege an acquittance of themselves that on a day and in a year, &c., he shall not answer before the full age of the minor. In the same manner if the minor's chief lord claims undue services and unusual customs from the minor. The same thing will happen that the *status* of the minor ought not to be changed, as if the father or other ancestor of the minor has acquitted a certain tenant of his of the said service towards his chief lords in the year and on the day, the said minor shall acquit him without any condition. Which, indeed, may be said of him who has given a certain land to a certain religious house as free, pure and perpetual alms, if an abbot or prior be distrained for some forinsic or other service, if in the year and on the day, on which the ancestor who was the donor died, the said claimant was in seysine of an acquittance, so that the ancestor of the minor acquitted him, the heir although a minor shall acquit him, as in St. Michael's term in the ninth and tenth years of the reign of king Henry, in the county of Kent, concerning the prior of Merton and Nigel de Mumbrey. And the same thing will happen although the warrantor has neither paid nor acquitted anything, when nothing has been claimed by the chief lord for a year and a day. Likewise if proceedings are had concerning the maritage of a certain person, or some other thing, whereof the minor has been vouched to warrant, if in the year and on the day when the ancestor was alive and died, the said ancestor was seysed of that maritage, an answer shall be given to the minor whilst under age; as in St. Michael's term in the ninth and tenth years of the reign of king Henry, in the county of York, concerning W. de Carleton and R. de Percy. Likewise the case of a minor, that if any one has made a pact f. 424. with his chief lord that his heir shall not be in his guardianship when he is under age, or that he shall not give a relief when he comes of age, and such chief lord has a superior chief lord, if it happens that both tenants die,

cõtingat utrumq̃ tenētē mori, hæredibus eorū infra ætatem existentib⁹, & custodia hæredis tenentis medii devenerit in manū superioris capitalis dñi, non possit hæres tenentis inferioris liberari quin fit in custodia superioris capitalis dñi, vel quin relevium det si major fuerit, non obstante charta vel cõventione facta cum tenente medio, nisi talis hæres ostendere poterit q̃ charta sic usitata fuerit q̃ alius hæres p̃cedens quietanciam habuerit, q̃ per talē conventionem sub custodia superioris capitalis dñi non extiterit, vel q̃ releviū non dediderit, ut de comitissa de Insula capitali domina, & W. de Crecure tenente suo, & W. de Honywell tenente W. de C., & unde idem W. de Crecure fuit medius inter comitissā & W. de Honywell. Quod autē dicitur q̃ status minoris mutari non debet in rebus corporalibus, sic nec in juribus nec in libertatib⁹, ut si alicui concedatur libertas de faciendo aliquid in alieno, vel in proprio, vel de utēdo fruendo in alieno, vel de habendo in alieno, vel in p̱prio: de faciendo gurgitē, stagnū, molendinū, piscariam, vel hujusmodi, de utendo fruendo, sicut eundi, agendi, aquam ducendi, falcandi, fodiendi, vel hujusmodi. Item de habendo in p̱prio ferias, mercata, furcas, vel hujusmodi, tol & theam, licet ille cujusmodi jura conceduntur statim non utatur, tunc est quasi in seysina, & jus illud transmittit ad hæredem suum majorem vel minorem, & semper videtur uti, donec amiserit per non usum, hoc est donec omninò eject⁹ fuerit & disseysit⁹, vel q̃ cõmode uti non possit, & sic nihil transmittit ad hæredē nisi tantū actionē de seysina sua vel quasi recuperanda, quam in vita sua

their heirs being under age, and the guardianship of the intermediate tenant shall have come into the hand of the superior chief lord, the heir of the inferior tenant cannot be released from being in the guardianship of the superior chief lord, or from giving a relief if he should become of age, notwithstanding a charter or convention made with the intermediate tenant, unless the said heir can show that the charter was so usual that another preceding heir had an acquittance, that through such a convention he was not under the guardianship of a superior chief lord, or that he did not give a relief, as in the case of the countess de l'Isle, a chief lady, and W. de Crecure her tenant, and W. de Honywell the tenant of W. de Crecure, and whereby W. de Crecure was intermediate between the countess and W. de Honywell. But as to what is said that the *status* of the minor ought not to be changed in corporeal things, so neither in rights nor in franchises, as if there be granted to a certain person the liberty of doing something in another person's tenement or in his own: or of enjoying a certain usufruct in another's tenement, or of having something in another's tenement or in his own of making a waterfall or a pool, or a mill, or a fishery, or something of the like kind, of using and enjoying, to wit, a pathway, a bridleway, an aqueduct, a right of reaping or digging, or such like. Likewise of having on one's own land fairs, markets, gallows, and such like, tol and theam, although he, whose rights are granted, does not immediately use them, he is then as it were, in seysine of them, and transmits that right to his heir, whether he be in his majority or his minority, and he seems always to use it, until he shall have lost it by non-user, that is until he has been altogether ejected and disseysed, or because he cannot conveniently use them, and so he transmits nothing to his heir except only an action concerning his seysine or the recovery of it, as it were, which he has lost in his lifetime, which his heir, although he be a minor, shall

amisit, quā hæres, licet minor sit, in minori ætate recuperabit per bře de ingressu: quia sicut minor ad tale bře de ingressu infra ætatem respondere tenetur, sic à fortiori ratione ei in consimili casu respōdebitur. Cùm autē quis hujusmodi jura ex donatione regis vel alterius, vel ex cōstitutione dominorū fundi & libertatis talis habuerit & illis usus fuerit, seysinā & usū trāsmittit ad hæredē, et eandē seysinā habebit hæres, sive major fuerit sive minor, quā habuit antecessor. Et cū semel in seysina fuerit, status suus mutari non poterit, secundū q antecessor suus obiit seysitus vel quasi. Et in hujusmodi non amittit quis, licet statim nō utatur, licet uti possit, donec fuerit disseysitus, vel cùm statim uti nō possit quia casus non evenit q uti posset. Sed si casus evenerit q uti posset & tunc non utatur, sed alius, vel cùm uti velit, impediatur q uti nō possit, vel non cōmodè, & sic disseysitus, in minore ætate hæredis non poterit status antecessoris mutari, nisi ex nova actione p hæredē de seysina. Sed si hæres in seysina fuerit, nemini infra ætatem respondebit. Et sic status suus mutari non poterit.

8. Replicatio, si in assisa mortis antecessoris vel in placito per breve f. 424 b. de recto objiciatur minori quod placitare non

Cùm autem minori opposita fuerit exceptio minoris ætatis, quòd petere non possit per breve de recto, vel seysinam antecessoris sui versus custodem, respondere poterit & replicare & dicere, major sum & plenæ ætatis, et hoc bene patet, quia omnes domini mei, de quibus teneo præter te, reddiderunt mihi hæreditatē meam, et me habent p majore, vel respondere poterit, q ætatē suam pbavit coram talibus. Et quoniam aliquando de ætate dubitari poterit, videndū erit qualiter pbatur ætas, quia respondere poterit tenens replica-

recover in his minority by a writ of entry, for as a minor is bound to answer whilst he is in his minority to such a writ of entry, so, for stronger reasons, he is entitled to obtain an answer in a similar case. But when a person has had these rights from a donation of the king or another person, or from a constitution of the lord of the estate and of the said franchise, and has used them, he transmits the seysine and the use to his heir, and the heir shall have the same seysine, whether he be in his majority or his minority, which his ancestor had. And when he has been once in seysine, his *status* cannot be changed, according as his ancestor has died seysed or as it were seysed. And in this sort of right a person does not lose it, although he may not immediately use it, notwithstanding he may be able to use it, until he has been disseysed, or when he cannot use it forthwith, because the occasion has not arisen that he could use it. But if the occasion has arisen that he could use it and then he does not use it, but another, or when he wishes to use it, he is impeded so that he cannot use it, or not conveniently, and so is disseysed, during the minority of the heir the *status* of the ancestor cannot be changed except by a new action through the heir concerning the seysine. But if the heir should be in seysine he shall answer to no one whilst he is under age, And so his *status* will not be able to be changed.

8. A replication, if in an assise of mortdancester or in a plea by a writ of right it be objected to the minor, that he can not plead,

But when an exception of minority has been opposed to a minor that he cannot claim by a writ of right, or the seysine of his ancestor against a guardian, he may answer and reply and say, I am of majority and of full age, and this is very evident, because all my lords, from whom I hold besides yourself, have restored to me my inheritance and treat me as of majority, or he may answer, that he has proved his age before so-and-so. And since sometimes it may be doubted concerning his age, we must see how full age is proved, because the tenant may answer to his replication, that he is f. 424 b.

possit quia minor est.

tioni suæ q̃ non est plenæ ætatis, quia si restituta sit ei hæreditas hoc fuit in fraudē, nec illi debet p̃judicare fraus illa. Item si respondeat petens q̃ plenæ ætatis sit, q̃ ætatē suam p̤baverit per inquisitionem & per patriā, responderi poterit à tenente quod hoc ei nocere non debet, quia juratores male juraverint, vel q̃ justiciarii male decepti fuerint, si p̤bata fuit ætas per aspectum corporis. Item responderi poterit q̃ non est plenæ ętatis quantum ad socagiū, nec quantum ad feodum militare. Item licet quantum ad socagiū, non tamen ad feodum militare. Item si dicat q̃ major sit quia in curia domini regis placitavit, sicut ille qui plenæ ætatis est, et ibi p̤ judicium recuperavit.

9. De probatione ætatis ex præsumptione per aspectum corporis.

Sed omnis talis responsio plenam & sufficientē probationem ætatis non inducit, nisi tantum una, q̃ sit per parentes & testes sufficienter examinatos, et omnes aliæ inducunt p̃sumptiones, sicut aspectus corporis & alię. Sed tamen q̃dam admittunt p̤bationem in contrarium & q̃dam nullam, sicut p̤ aspectum corporis p̤ visum justiciarii, ut si appareat talis q̃ p̃sumi possit de eo vehementer q̃ plenæ ætatis fuerit, ut si fuerit barbatus, statura magnus, vel hujusmodi, et cùm justiciarii talem adjudicaverint p̤ majore, p̤ majore habebitur quantum ad omnes, et non erit ulteriùs contra eorum judicium disputandū. Sed quoniam appareat sæpius quòd aliquis major sit cùm sit minor, et è contrariò cùm minor sit apparet esse major, et ex hoc dubitaverint justiciarii, de necessitate recurrendum est ad p̤bationem patriæ & parentū, sive minor petat sive petatur ab eo. Sed qualiter hoc fieri debeat videndū.

not of full age, because if his inheritance has been restored to him it has been restored fraudulently, nor ought that fraud to prejudice him. Likewise if the claimant should answer that he is of full age, that he has proved his age by an inquest and by the country, it may be answered by the tenant that this ought not to hurt him, because the jurors have sworn badly, or because the justiciaries have been badly deceived, if age has been proved by the look of the body. Likewise it may be answered that he is not of full age as regards socage, nor as regards a military fief. Likewise although he may be of age as regards socage-tenure, he is not so however as regards a military fief. Likewise if he shall say that he is of majority because he has pleaded in the court of the lord the king, just as he who is of full age, and he has there recovered by a judgment. because he is a minor.

But every answer of this kind does not induce a full and sufficient proof of age, except one kind only, which is made through parents and witnesses sufficiently examined, and all the others give rise to a presumption, such as the look of the body and others. But notwithstanding this some persons admit a proof to the contrary, and some persons not, so as by the look of the body by the view of the justiciaries, as if a person should appear such that a strong presumption arises concerning him that he is of full age, as if he should be bearded, great in stature, or such like, and when the justiciaries have adjudged such a person to be of majority, he shall be held to be of majority as regards all persons, and no further dispute is to be raised against their judgment. But since it is repeatedly apparent that a person is of majority when he is a minor, and on the contrary when he is a minor he appears to be of full age, and thereupon the judges have doubted, of necessity recourse must be had to the proof of the neighbours and of the relatives, if either a minor is the petitioner or a petition is brought against him. But how this is to be done ought to be seen. 9. Concerning the proof of age by the look of the body.

10. Si justiciarii dubitaverint, cum venerint.

Et sciendū q̄ per duodecim legales homines vel plures si opus fuerit, quorum quidam de parentela ejus qui dicit se esse majorem, et quidā qui non sunt de parentela ejus, p̄ quos rei veritas melius sciri poterit, et qui examinati nulla rātione inveniantur suspecti, sed certis judiciis manifesti: & est forma sacramenti.

11. Qualiter probatur ætas per patriam cum per aspectum corporis probari non possit, et per quos.

Jurare enim debent, q̄ talis habet ad minus viginti et unum annum & plus, vel q̄ non sit viginti et unius anni. Jurare autem debet primus sic, quòd habet viginti & unum annum et amplius si fuerit masculus. Si autem fœmina quòd habet quatuordecim vel quindecim annos et amplius, sic me Deus adjuvet & sancta Dei Evangelia, &c. Et post primum alius sic: Et illud sacramentum q̄ talis fecit verum est, sicut me Deus adjuvet, et sic alii omnes. Et sic admittetur minor ad agendū vel respondendū secundū diversitatem tenementorum, vel si dixerit contrarium non admittetur. Et quòd ita p̄bari debeat ætas, habetis de termino Sancti Michaelis anno regni regis Henrici tertio incipiante quarto in comitatu Sussex de Johanne de Bruse et Reginaldo Bruse, quia justiciarii per aspectum corporis non possunt esse certi de ætate p̃dicti J. Et ideo consideratum fuit, quod fieret p̄batio per patriam et p̄ parentes. Sed hic quòd assumi debeant parentes, videndum erit utrum fieri debet p̄batio pro minori vel contra minorem, quia sive sic sive sic, in omni
f. 425. casu possunt parentes esse testes suspecti. Aliæ vero responsiones omnes quia levē inducūt p̃sumptionē admittunt p̄bationem in contrariū.

12. Ex præsumptione, ut si quis

Probatur quandoq̃ ætas ex p̃sumptione etiam indirectè, & sine corporis aspectu, & sine testium p̄ductione, ut si quis agat cōtra alium & gerat se p̄ majore,

And it is to be known that through twelve loyal men or more if it be necessary, some of whom shall be of the relatives of him who says that he is of full age, and some who are not of his relatives, through whom the truth of the matter may be better known, and who on examination have been found to be in no manner suspect, but manifest by certain judgments, and there is a form of oath. 10. If the justiciaries have doubted, when they have come.

For they ought to swear that so-and-so has at least twenty-one years and more, or that he is not of the age of twenty-one years. But the first ought to swear in this manner, that he has twenty-one years and more, if it be a male. But if it be a female, that she has fourteen or fifteen years and more, so may God help me and the holy gospels of God, &c. And after the first then another thus: and the oath which so-and-so has made is true, so may God help me, and so all the others. And so a minor shall be admitted to proceed and to answer according to the diversity of tenements, or if he has said the contrary, he shall not be admitted. And that full age ought to be so proved, you have a case in St. Michael's term in the third and fourth year of king Henry, in the county of Sussex, concerning John de Bruse and Reginald Bruse, because the justiciaries could not be certain from the look of the body concerning the age of John. And therefore it was held that proof should be made through the neighbours and the relatives. But in this matter that the relatives should be called in, it will have to be seen whether the proof ought to be made in behalf of a minor or against a minor, because whether so or whether so in every case the relatives may be suspected. But all other answers, because they induce a slight presumption, admit of proof to the contrary. 11. How the age is proved by the country, when it cannot be proved by the look of the body, and through whom. f. 425.

Full age is sometimes proved from a presumption even indirectly, and without a look of the body and without the production of witnesses, as if a person pro- 12. From a presumption, as if

alios placitaverit, sicut major.

sive major sit sive non, aliis agentibus cõtra se respondebit, si forte contra ꝓcessum & factum suum dicat se esse minorem, quia ex quo semel se fecit majorem & ꝑ se, contra se habeatur ꝑ majore. Item ex ꝑsumptione, ut si aliquis alios implacitaverit sicut major, aliis respondebit ut major. Item ꝑbari poterit quandoq̃ ætas ꝑ assisam, et ꝑ juratores assisæ tantum, quandoq̃ exhibitis aliis ex causa parentibus et vicinis, ut si quis qui in custodia extiterit petat hæreditatẽ suam versus capitalem dominũ ꝑ assisam mortis antecessoris, et objiciatur ei q̃ non sit plenæ ætatis, et quo casu, cùm sic ꝑbata fuerit ætas, sufficit, nec in contrarium admittitur convictio, vel alia ꝑbatio propter consensum, maxime quantum ad illum qui hujusmodi exceptionẽ objecit, licet (secundum quosdam) non teneat quantum ad alios, quia hujusmodi juratores falli possunt vel falsum facere sacramentũ prece vel precio corrupti. Si autem minorem se dicat quis, cùm sit major, et ad tuitionẽ sui prætendat minorem ætatem q̃ non respondeat, sufficit quòd probetur ætas quocunque modo, ut sic respondeat petenti, et per hoc tenebitur respondere omnibus aliis. Item ubi et quando debeat ætas probari videndũ, & sciendum quòd in curia domini regis sine resummonitione, ubi ille cui objicitur minor ætas petens fuerit per assisam mortis antecessoris versus dominum capitalem. Si autem objecta fuerit pro se ne respondeat ante ætatem, vel contra se à tenente ne ei respondeatur, tunc post resummonitionem fiat probatio

ceeds against another and holds himself out to be of full age, whether he be of full age or not, he shall answer to others proceeding against him, if by chance in contradiction to his proceeding and his act he should say that he was a minor, for from the time when he has once made himself out to be of full age and for his own advantage, he shall be held to be of full age as against himself. Likewise from a presumption, as if a person has sued others as if he were of full age, he shall answer to others as if he were of full age. Likewise full age may sometimes be proved by an assise, and by the jurors of an assise alone, others being sometimes produced upon cause shown who are relatives or neighbours, as if a person who has been under a guardian claims his inheritance against his chief lord by an assise of mortdancester, and it be objected to him that he is not of full age, and in which case, when his age has been so proved, it is sufficient, nor is a conviction admitted to the contrary or any other proof on account of consent, especially as regards him who has raised an objection of this kind, although (according to some) it does not hold good as regards others, because jurors of this kind may be deceived or make a false oath corrupted by entreaty or by money. But if a person says that he is a minor when he is of full age, and for his own protection pretends minority, that he may not answer, it is sufficient that his age should be proved in any manner whatsoever, that he may so answer to the claimant, and he shall be thereby bound to answer to all others. Likewise it is to be considered where and when full age ought to be proved, and it is to be known that in the court of the lord the king without a resummons, where he, to whom minority is objected, is the claimant by an assise of mortdancester against his chief lord. But if it has been objected on his behalf that he should not answer before he is of full age, or against him by a tenant that he may not be required to make answer to him, then after a resummons

a person has sued others as if of full age.

ætatis si inde dubitetur, et fiat resummonitio ad instantiam petentis per hoc breve.

13. De resummonendo loquelam ad curiam, quæ remansit sine die propter minorem ætatem.

Rex vicecomiti salutem. Summoneas per bonos summonitores A. quòd sit coram justiciariis nostris apud &c. auditurus recordum & judicium suum de loquela q̃ fuit in eadē curia coram &c. inter B. petentē et p̃dictum A. tenentē, de tanta terra cum ꝑtinentiis in tali villa, ita q̣ loquela illa tunc sit ibi in eodem statu in quo fuit quando remāsit sine die, eo q̣ p̃dictus A. tunc fuit infra ætatem, & nunc habet ætatē ut dicitur. Et habeas ibi sum̄onitores & hoc breve. Teste &c. Cùm autem ad curiam venerit, si de ætate dubitetur, fiat ꝑbatio ut supra. Si autem constiterit q̣ plenæ ætatis fuerit, tunc ꝑcedat loquela inter partes. Si autem nondum plenæ ætatis, tunc inquiratur infra q̣ tempus plenæ ætatis esse possit, et fiat inde mentio in rotulis. Cùm autem probata fuerit ætas contra dominū capitalem cum petens recuperaverit seysinam, tunc si vastum factum fuerit, vel destructio, fiat br̃e de seysina facienda & de inquisitione de vasto simul & in uno br̃i in hac forma.

14. Breve, cum seysinam recuperaverit jam major factus versus dominum capitalem, f. 425 b. et similiter

Rex vic. salutē. Scias q̣ A. filius & hæres B. in curia nostra coram &c. per judiciū ejusdē curiæ nostræ, sicut ille qui in eadem curia nostra ætatem suam ꝑbaverit, legitimè recuperavit seysinam suam versus C. de terris & tenementis quæ fuerunt p̃dicti B. patris sui in balliva tua, quarum terrarum et tenementorū idem C. habuit custodiam de concessione nostra. Et ideo tibi p̃cipimus q̣ eidem A. de omnibus terris &

let there be proof made of his full age, if it be doubted thereon, and let a resummons be made at the instance of the claimant by a writ of this kind.

13. Concerning the resummoning of the cause for hearing, which has been stayed without a day on account of minority.

The king to the viscount greeting. Summon by good summoners A. that he present himself before our justiciaries &c., in order to hear the record and his judgment concerning the cause which was in the same court before &c., between B. as claimant and the aforesaid A. as tenant, concerning so much land with its appurtenances in such a vill, so that the said cause shall then be in the same state in which it was when it was stayed without a day, inasmuch as the aforesaid A. was then under age, and now he has full age as it is said. And have there present the summoners and this writ. Witness, &c. But when he has come to the court, if there be doubt as to his full age, let there be proof made as above. But if it be established that he is of full age, then let the cause be argued between the parties. But if it be established that he is not yet of full age, then let it be inquired within what time he may be of full age, and let mention be made thereof in the rolls. But when full age has been proved against a chief lord, when the claimant shall have recovered seysine, then if waste has been made or destruction, let a writ issue for making seysine and for an inquest concerning waste at the same time and in one writ in this form.

14. A writ, when a person arrived at his majority has recovered seysine against his chief lord, f. 425 b. and at the same time

The king to the viscount greeting. Know that A. the son and heir of B. in our court before &c. by a judgment of our said court, just as he who has proved in our said court his full age, has legitimately recovered his seysine against C. of the lands and tenements which belonged to the aforesaid B. his father in your bailiwick, of which lands and tenements the said C. had the custody from our grant. And accordingly we enjoin you that you cause the said A. to have plenary seysine without delay of all the lands and tenements which

de vasto facto in uno brevi.

tenementis quæ fuerunt p̃dicti B. patris sui, vel quæ fuerūt in manu p̃dicti C. de eadē cōcessione nr̃a in balliva tua, sine dilatione plenariā seysinā habere facias. Et quoniā testatū est corā p̃fatis justic. nostris q̄ p̃dictus C. dū terra illa fuit in manu sua de p̃dicta concessione nr̃a magnū inde fecit vastū & exiliū, in domibus, gardinis, boscis, et aliis ad exhæredationem ipsius A., tibi p̃cipimus q̄ assumptis tecum xii. tam militibus quàm aliis liberis & legalibus hominibus &c. ut supra, accedas ad p̃dictam terrā et per eorum sacramentum &c. Et unde idem A. q̃ritur q̄ p̃dictus C. vastum fecit et destructionem ad valentiam tanti, et inquisitionem mittas &c.

Cap. XXII.

1. De loquela ad curiam resummonendam, quæ posita fuit sine die.

Quoniam vero multis de causis et rationibus possunt loquelæ poni sine die in curia domini regis, et cessantibus vel terminatis causis illis necesse sit loquelas illas resummonere, ideo videndum qualiter fieri debeant resummonitiones ex causis diversis, et de aliquibus dictum est supra, videlicet qualiter debet resummoneri loquela quæ p̃pter bastardiam transmittatur ad curiam Christianitatis, et sic in curia regis remansit sine die. Item si propter minorem ætatem, si minor petat vel ab eo petatur: nunc autem dicendum si remanserint sine die eo q̄ minor vocatus sit ad warrantum, et tunc sic.

2. Breve de resummonendo loquelam, ubi remansit

Rex vicecom̃ salutem. Summoneas per bonos summonitores A. q̄ sit &c. ut supra, auditurus recordum et judicium suum de loquela quę fuit in eadem curia nr̃a inter B. petentē et C. tenentem de tanto terræ

belonged to his said father B., or which were in the hand of the aforesaid C. from our said grant in your bailiwick. And since it has been testified before our aforesaid justiciaries that the said C., whilst that land was in his hand from our aforesaid grant, has made great waste and exile in houses, gardens, woods and other things to the disherison of the said A., we enjoin you that having assumed to yourself twelve as well knights as other free and loyal men, &c. as above, you visit that land and by their oath &c. And whereof the said A. complains that the aforesaid C. has made waste and destruction to the value of so much, and send an inquest, &c. concerning waste in the same writ.

Chapter XXII.

Since indeed for many causes and reasons hearings may be put down in the court of the lord the king without a day, and the causes ceasing or having been terminated it becomes necessary to resummon them for hearing, we must accordingly see in what manner resummonses ought to be made from divers causes, and concerning some it has been treated above, forsooth in what manner a cause ought to be resummoned for hearing, which on account of bastardy is transmitted to the court of Christianity, and so has been stayed without a day in the court of the king. Likewise if on account of minority, if a minor claims or a claim is made against him; but now we must treat of the case where they have been stayed without a day, inasmuch as a minor has been vouched to warrant, and then thus. 1. Concerning the resummons to the court of a cause for hearing which has been stayed without a day.

The king to the viscount greeting. Summon by good summoners A. that he be &c. as above, in order to hear the record and his judgment concerning the cause which stood for hearing in our said court between B. the claimant and C. the tenant concerning so much land with its appurtenances in such a vill, and whereof the 2. A writ to resummons a cause for hearing where it has been stayed without a

sine die propter ætatem minoris, qui vocatus fuit ad warrantum.

cū ꝑtinentiis in tali villa, et unde idem C. (qui tenens est) vocavit ad warrantū ꝑdictum A. et ita q̄ loquela illa tunc sit in eodem statu quo fuit quando remansit sine die, eo q̄ idem A. tunc fuit infra ætatē, et qui nunc habet ætatem ut dicitur. Et sum̄oneas per bonos sum̄onitores ꝑdictum A. q̄ tunc sit ibi ad warrantizandum prædicto C. terram illam, vel ad ostendendum quare warrantizare nō debeat, et habeas ibi sum̄onitores et hoc br̃e. Teste &c.

3. Item propter iter justiciariorum et pro servitio regis.

Si autē remanserit sine die propter iter justic. tunc sic: sum̄oneas &c. ut supra, ita q̄ loquela illa tunc sit ibi in eodē statu in quo fuit quando remansit sine die ꝓpter iter justiciariorū ꝑ singulos com̃, vel sic: quando posita fuit coram justiciariis ad primam assisam cùm ad partes illas venissent, ad quas nondū venerint sicut ꝓvisum fuit, vel aliter: si remansit sine die ꝑ servitio dn̄i regis, tunc sic: Ita q̄ loquela illa tunc sit in eodē statu, in quo fuit quando remansit sine die, eo q̄ prædictus talis profect⁹ fuit in partes transmarinas in servitio nostro, vel alibi per præceptum nostrum, et
f. 426. de quibus idem talis reversus est ut dicitur.

4. Item propter peregrinationem in Terram Sanctam.

Item aliter, si in Terram Sanctam, et tunc sic. Ita q̄ loquela illa tunc sit in eodem statu in quo fuit die quo remansit sine die, eo q̄ ꝑdictus talis profectus fuit in Terram Sanctam, de qua nunc reversus est ut dicitur.

5. Item si ad curiam Christianitatis quacunque de

Item si placitum dotis in curia dn̄i regis remanserit sine die ꝓpter inquisitionem transmissam ad curiam Christianā et tunc sic. Sum̄oneas per bonos sum̄onitores A. q̄ sit ad respondendum B. mulieri quare non

said C. (who is the tenant) has vouched the aforesaid A. to warrant, and so that the cause should stand for hearing in the same state in which it was when it was stayed without a day, inasmuch as A. was then under age, and who is now of full age as it is said. And summon by good summoners the aforesaid A. that he be there present to warrant to the aforesaid C. that land, or to show why he ought not to warrant it, and have there the summoners and this writ. Witness, &c.

day on account of the age of a minor, who has been vouched to warrant.

But if it has been stayed without a day on account of the iter of the justiciaries then thus: Summon &c. as above so that the cause may stand for hearing there in the same state in which it was when it was stayed without a day on account of the iter of the justiciaries through the several counties; or thus, when it was placed before the justiciaries at the first assise when they should have come into those parts, to which they have not yet come as was provided: or otherwise, if it has been stayed without a day for the service of the lord the king, then thus: So that that cause shall stand for hearing in the same state in which it was when it was stayed without a day, inasmuch as so-and-so aforesaid had set out for parts beyond the sea in our service or elsewhere through our command, and from which the said so-and-so has returned as it is said. f. 426.

3. Likewise on account of the iter of the justiciaries and for the service of the king.

Likewise otherwise, if he has set out for the Holy Land, then thus: So that the cause shall stand for hearing in the same state in which it was on the day on which it was stayed without a day, inasmuch as so-and-so aforesaid had set out for the Holy Land, from which he has now returned as it is said.

4. On account of a journey to the Holy Land.

Likewise if a plea of dower in the court of the lord the king has been stayed without a day on account of an inquest transmitted to the court of Christianity, and then thus: Summon by good summoners A. that he be present to answer to the woman B. wherefore he does not Christi-

5. Likewise if it has been transmitted to the court of

causa vel in placito dotis.

reddit ei dotem suam, quæ eam contingit de libero tenemento suo, q̃ fuit talis viri sui &c. ita q̃ loquela illa tunc sit ibi in eodem statu, in quo fuit quando remansit sine die, eo q̃ prædictus A. objecit eidē B. quòd non debuit inde dotem habere, eo quòd prædictus talis vir suus, p̱ quem dotem petiit, vivus fuit. Et unde p̃dicta B. coram p̃dictis justic. nostris sectam sufficientem p̱duxit q̃ mortuus est, et sic de aliis, ubi inquisitio facienda est in foro seculari. Si autem facienda sit inquisitio in curia Christianitatis in suo casu in placito dotis, tunc sic: et ita quòd loquela illa, vel: unde loquela illa transmissa fuit ad curiam Christianitatis eo q̃ p̃dictus A. objecit eidem B. q̃ non debuit inde dotem habere, quia nunquam fuit tali viro suo desponsata, vel aliter: videlicet legitimo matrimonio copulata.

6. Si in partes transmarinas in servitio regis de advocatione.

Item si de advocatione ecclesiæ fuerit loquela, et remanserit sine die propter servitium dñi regis, tunc fiat resum̄onitio ut supra. Si autem de assisa ultimæ p̃sentationis, tunc sic: Auditurus recordum et judicium suum de assisa ultimæ p̃sentationis q̃ summonita fuit coram eisdem justiciariis nr̃s &c. inter A. petentem et eundem B. deforciatorem, ita q̃ assisa illa tunc sit in eodem statu in quo fuit quando remansit sine die, eo q̃ p̃dictus B. profectus fuit ad partes transmarinas in servitio nostro per p̃ceptum nostrum. Et ex p̃dictis sumi poterit exemplum qualiter in casibus consimilibus fieri debeat resum̃onitio.

7. Si generalis fieri debeat

Si autem generalis fieri debeat resummonitio ad bancum, eo q̃ omnes loquelæ de banco positæ sunt

render to her her dower, which pertains to her from her free tenement which belonged to so-and so her husband &c., so that the cause shall then stand for hearing there in the same state in which it was when it was stayed without a day, inasmuch as the aforesaid A. has objected to the said B. that she ought not to have the said dower therefrom, inasmuch as so-and-so her aforesaid husband, through whom she claims dower was alive. And whereupon the aforesaid B. before our said justiciaries produced a sufficient sect to prove that he is dead, and so concerning other things where an inquest is to be held in a secular court. But if an inquest is to be held in a court of Christianity in its own case in a plea of dower then thus: and so that the cause for hearing, or whereupon the cause for hearing was transmitted to the court of Christianity, inasmuch as the aforesaid A. objected to the said B. that she ought not to have dower therefrom, because she was never espoused to so-and-so her husband, or otherwise, to wit, coupled in lawful matrimony.

anity for any cause or in a plea of dower.

Likewise if the cause for hearing should be concerning the advowson of a church, and it has been stayed without a day on account of the service of the lord the king, then let a resummons be made as above. But if concerning an assise of last presentation, then thus: in order to hear the record and his judgment concerning the assise of last presentation which was summoned before our said justiciaries &c. between A. the claimant and B. the deforceor, so that the assise be in the same state in which it was when it was stayed without a day, inasmuch as the aforesaid B. had set forth to parts beyond the sea in our service by our command. And from the instances aforesaid an example may be derived in what manner a resummons ought to be made in similar cases.

6. If he is in parts beyond the sea in the service of the king concerning an advowson.

But if a general resummons to the bench ought to be made, inasmuch as all the causes for hearing before the bench are placed without a day on account of the

7. If a general resummons ought to be

resummonitio ad bancum.

sine die ꝑpter itinerationem justic. in diversis coñ, tunc fiat resum̄onitio in diversis coñ in hac forma.

8. Breve vicecomiti, quod clamare faciat.

Rex vic. salutē: p̃cipimus tibi q̄ sine dilatione clamare facias in coñ tuo, et per coñ tuum in diversis hundredis, et mercatis, et ꝑ omnes ꝑtes de coñ tuo, q̄ omnia placita q̃ per brevia nostra, vel per p̃ceptum justic. nostrorū de banco atterminata fuerunt apud West. infra octabas S. Hilarii ultimò p̃teritas et Paschæ ꝓxime sequentes, et q̃ per p̃ceptum nostrum posita fuerunt sine die occasione itinerationis talis, vel occasione exercitus nr̃i in Walliam, vel alterius, sint coram justic. nostris &c. apud W. ad talem terminū in eodem statu in quo fuerunt quando remanserunt sine die per p̃ceptum nostrum occasione p̃dicta, tam de essoniis faciendis et non faciendis, quam de omnibus aliis circumstantiis eorundem placitorum. Alia vero placita, quæ per preceptum nostrum vel p̃ceptum p̃dictorum justic. nostrorum itinerantium posita fuerunt post certum diem ad talem terminum apud talem locum ad talem terminū et talem, ibi deducantur, & teneantur sicut ibi posita fuerunt, et habeas ibi hoc br̃e, et alia brevia omnia quæ penes te habes pertinentia ad p̃dicta placita. Teste &c.

Cap. XXIII.

f. 426 b.

1. Exceptio ex persona petentis propter lepram vel propter excommunicationem.

Competit etiam tenenti exceptio dilatoria ex persona petentis, eo q̄ separatus est à com̄unione gentium ꝓpter lepram q̃ est in anima, ut si fuerit specialiter excom̄unicatus, quia sicut quis poterit habere lepram in corpore, ita et in anima. Excom̄unicato enim interdicitur omnis act⁹ legitimus, ita q̄ agere non potest nec aliquem convenire, licet ipse ab aliis possit cōve-

itineration of the justiciaries in the different counties, then let a resummons be made in the different counties in this form. made to the bench.

8. A writ to the viscount that he proclaim.

The king to the viscount greeting. We enjoin you that without delay you cause proclamation to be made in your county court and throughout your county in the different hundreds and markets and through all parts of your county, that all the pleas which through our writs or through the order of our justiciaries of the bench were put off at Westminster between the octaves of St. Hilary last past and those of Easter next following and which through our precept were set down without a day on the occasion of the said itineration, or on occasion of our army marching into Wales or of something else, shall be held before our justiciaries &c. at W. at such a term in the same state in which they were when they were stayed without a day through our precept on the aforesaid occasion, as well concerning the making of essoins and the non-making of them, as concerning all other circumstances of the said pleas. But let the other pleas, which through our precept or the precept of our aforesaid justiciaries itinerant were set down after a certain day for such a term at such a place for such and such a term be brought forward and entertained, as they were there set down, and have there this writ, and all the other writs which are in your possession pertaining to the aforesaid pleas. Witness, &c.

Chapter XXIII.

f. 426 b.

1. An exception against the person of the claimant on account of leprosy or on account of excommunication.

The tenant is also entitled to a dilatory exception against the person of the claimant, on the ground that he is separated from the communion of men on account of leprosy which is in his soul, as if he has been specially excommunicated, because as a person may have leprosy in his body, so he may have it also in his soul. For an excommunicated person is interdicted from every legal act, so that he cannot bring an action nor convene any person, although he may be convened by

Britton, ii. ch. xviii. § 1. Fleta, vi. c. 45, § 1.

niri. Qui autē hujusmodi exceptionē opposuerit, oportebit eum habere p̄bationem, quia simplici voci tenentis non erit fides adhibenda, nec etiam cujuslibet de populo testimonio, quia oportebit eum qui excipit in hoc casu, habere literas ordinarii, sicut archiepiscopi, vel episcopi, vel alterius judicis ordinarii, vel delegati, rei veritatē testificantes q̄ talis nominatim excom̄unicatus sit, et ex tali causa, vel si ordinarius p̄sens sit & hoc testificetur vivâ voce. Funestam enim vocem interdici oportet, potius q̄m audiri, nec solum vox eorum interdicitur, sed si quid ab ipsis fuerit impetratum, firmitatem non obtinebit. Cum excom̄unicato autem nec orare, nec loqui, nec palam nec abscondite, nec vesci licet, exceptis quibusdam p̄sonis.

2. Si vir uxoris appellatus sit de felonia, non cadit actio ante convictionem instituta.

Conveniri autē potest (sicut p̄dictum est), nē melioris conditionis sit q̄m non excommunicatus, vel ne de malitiâ sua possit lucrum deportare. Ut si vir & uxor implacitati fuerint de hæreditate uxoris, si vir de felonia appellatus fuerit & convictus, tamen p̄pter hoc non cadit actio prius ante cōvictionem instituta, et sic ex malitia lucrū non reportant, q̄ cadere possit actio, licet differri possit ad tēpus p̄pter dubium eventum appellati, dum tamen convictus non fuerit condemnatus ad mortē naturalem vel civilē. Naturalē, ut si suspensus fuerit, quo casu cadit actio. Si autē civilē, eodem modo, ut si utlagatus fuerit. Si autē tale fuerit crimē, q̄ ultimū non inducat suppliciū, sed tantū membrorū amissionē, sicut oculos, aut testiculos, vel utrūq̄, p̄pter hoc non cadit actio prius instituta: ut de itinere M. de P. in com̄ Lync., de Thomas de Rasue,

others. But he who has raised an objection of this kind, must have the necessary proof, because faith is not to be given to the simple voice of the tenant, nor indeed to the testimony of any one of the public, because it will be incumbent for him who excepts in this case, to have letters from the ordinary, as from the archbishop or a bishop or some other judge ordinary or delegate, testifying the truth of the matter, that so-and-so by name has been excommunicated, and for such a cause, or if the ordinary be present and testifies this orally. For an unlucky voice ought to be interdicted rather than heard, and not only is their voice interdicted, but if any writ has been obtained by them, it shall not have validity. For it is not allowable to pray with nor to speak with, either in public or in secret, nor to eat with an excommunicated person, except to certain persons.

2. If the husband of a wife is accused of felony before conviction.

He may be however convened (as stated above), lest he should be in a better condition than a person not excommunicated, or lest he may derive gain from his own wickedness. As if a husband and wife have been impleaded concerning the inheritance of the wife, if the husband has been accused of felony and has been convicted, on that account the action does not fall, having been previously instituted before the conviction, and so they do not derive gain from their wickedness, that the action should fall, although it may be put off for a time on account of the doubtful event of the accused party, provided however the convicted party be not condemned to a natural or a civil death. A natural death, as if he should have been hanged, in which case the action falls. But if a civil death, in the same manner as if he had been outlawed. But if the crime be such that it does not entail an extreme punishment, but only the loss of members, as of eyes or testicles or both, on that account an action previously commenced does not fall, as in the iter of Martin de Pateshull in the county of Lincoln, concerning

&c. A petente vero in contrarium sic poterit responderi, Frater, si essem excom̄unicatus, absolut⁹ sum à tali superiore judice ordinario vel delegato, ad q̃m appellavi. Item dicere poterit, q̄ si excom̄unicatus fui, hoc fuit de facto, quia nulla subfuit causa alia, nisi q̄ judici ecclesiastico obtēperare noluit cognoscēti de layco feodo, vel de catallis et debitis q̃ nō sunt de testamēto vel matrimonio, et unde hora cōgrua exhibui eis literas dñi regis p̄hibitorias ne p̄cederent, et quib⁹ p̃dicti judices differre noluerūt. Itē respōderi poterit q̄ excom̄unicatio nulla fuit, vel injusta, quia à tali sētētia rite fuit appellatū, et plures alias p̃tēdere poterit respōsiones ad tuitionē stat⁹ sui, sed ad manū statim habeat p̄bationē, quia cū cōstiterit de excommunicatione, de absolutione constare oportebit.

3. Si quis rite excommunicatus fuerit et f. 427. extiterit in excommunicatione per quadraginta dies.

In fine vero notandum, quòd ubi quis fuerit rite excommunicatus, et in ea pertinacia & excommunicatione pertinaciter perseveraverit per xl. dies, claves Ecclesiæ contemnendo, tunc (ut gladius gladium adjuvet) ad mandatum episcopi vel ejus officialis capiatur excom̄unicatus. Sed nunquam capietur aliquis ad mandatū judicum delegatorum, vel archidiaconum,[1] vel alterius judicis inferioris, quia rex in episcopos coercionem habet p̄pter baroniam. Cùm autem talis capi debeat rationabili de causa, cûm cancellarius literas episcopi receperit, fiat breve in hac forma.

4. Breve de excommunicato capiendo.

Rex vicecomiti salutē. Significavit nobis venerabilis pater N. p̄ literas suas patentes, quòd talis ob manifestam contumaciam suam excommunicatus est, nec se

[1] "archidiaconi" MS. Rawl. C. 160.

Thomas de Rasue &c. But by a claimant an answer to the contrary may be thus given, Brother, if I have been excommunicated, I have been absolved by such a superior judge ordinary or delegate, to whom I appealed. Likewise he may say, that if I have been excommunicated, this was in fact, because there was no other cause, except that I was unwilling to obey the ecclesiastical judge holding cognisance of a lay feud, or of chattels or debts which were not testamentary nor matrimonial, and whereon at a suitable hour I exhibited to them letters of the lord the king prohibiting them from proceeding, and to which the aforesaid judges were unwilling to defer. Likewise it may be answered that the excommunication was null, or unjust, because an appeal was duly made from the sentence, and he may bring forward several other answers to defend his status, but let him have immediately at hand the proof, because if the excommunication be established, it will be incumbent that the absolution be established.

3. If a person has been duly excommunicated, and has persisted in his excommunication for forty days.

But in the end it is to be noted, that when a person has been duly excommunicated and has persevered obstinately in that obstinacy and excommunication throughout forty days, contemning the keys of the church, then (that sword may aid sword) let the excommunicated person be seized upon the mandate of the bishop or his official. But no one shall ever be seized upon the mandate of judges delegate or of an archdeacon or any other inferior judge, because the king has coercion over bishops on account of their barony. But when such a person ought to be seized for a reasonable cause, when the chancellor has received the letters of the bishop, let a writ issue in this form.

f. 427.

4. A writ to seize an excommunicated person.

The king to the viscount greeting. The venerable father N. has signified to us by his letters patent, that so-and-so has been excommunicated on account of his manifest contumacy, nor is he willing to submit himself

vult per cēsuram ecclesiasticam justiciare. Quia vero potestas regia sacrosanctæ ecclesiæ in querelis suis deesse non debet, tibi p̃cipimus quòd p̃dictum talem per corp^{9} suum (secundum consuetudinem Angliæ) justicies, donec sacrosanctæ ecclesiæ tam de contēptu, quàm de injuria ei illata ab eo fuerit satisfactum. Teste meipso apud Westmonasteriū &c. Qui cûm captus fuerit & ecclesiæ satisfecerit, deliberabitur ad mandatum episcopi per tale b̃re. Rex vicecomiti salutem. Quia venerabilis pater talis episcopus significavit nobis, quòd talis quantum ad mandatum suum, vel ad mandatum talis venerabilis patris talis episcopi, à te capi et per corpus suum tanquam cōtemnentem claves ecclesiæ justiciari p̃ceperimus, beneficium absolutionis impēdit, tibi p̃cipimus q̃ à prisona nostra qua detinetur ipsum deliberari facias quietum &c. Et notandum q̃ ad nullius mandatum deliberari debet, nisi ad mandatum dñi episcopi, nec antequā ipse mandaverit quòd ecclesiæ sic satisfecerit, nisi captus fuit per falsam suggestionem ordinarii, vel aliorum p̃latorum, vel si per malitiam adversarii, ut eum excludat ab actione quam versus eum instituit. Et si ita, tunc fiat tale breve ad ipsius deliberationem.

5. Si appellatus de felonia ad appellum declinandum falso dedit intelligi episcopo, quod appellans excommunicatus fuit, et captus fuit, breve

Rex vicecomiti salutem. Ostensum est nobis ex parte talis, q̃ cùm aliquando appellasset quendam talem in comitatu tuo de roberia & hujusmodi, & tibi à nobis p̃ceptum esset quòd talem appellatum attachiares: Idem appellatus, ut ipsum talē appellantē gravaret, & appellum suum adnihilaret, falsò suggessit episcopo tali, quòd idem appellans in quadam excommunicatione perseveravit contumaciter p̃ quadraginta dies et amplius, & ita q̃ literas ab eodem episcopo impetravit ad nos directas q̃ extenderemus brachium seculare, per cujus deceptionem idem appellans cap-

to ecclesiastical censure. Because the regal power ought not to fail holy church in its complaints, we enjoin you that you enforce justice against him personally (according to the custom of England) until satisfaction has been made by him to holy church for his contempt as well as the injury caused to her. Witness myself at Westminster, &c. Who, when he has been seized and has satisfied the church, he shall be delivered upon the mandate of the bishop by such a writ. Because the venerable father bishop so-and-so has signified to us that to so-and-so, whom at his mandate or at the mandate of the venerable father so-and-so the bishop so-and-so we enjoined that he should be seized by you and have justice personally enforced against him as contemning the keys of the church, he has granted the benefit of absolution, we enjoin you that you cause him to be set free and quit from our prison in which he is detained. And it is to be noted that he ought not to be set free upon the mandate of any one, except at the mandate of the lord bishop, nor before he has sent word that he has satisfed the church, unless he has been seized through a false suggestion of the ordinary or other prelates, or through the malice of an adversary, that he might exclude him from an action which he had brought against him. And if so, then let a writ of this kind issue for his delivery.

5. If a person accused of felony in order to frustrate the charge has falsely led the bishop to understand that the accuser has been excommunicated, and he has

The king to the viscount greeting. It has been shown to us on the part of so-and-so, that when he had accused a certain person in your county court of robbery and such like and we had enjoined you to attach such accused person, the said accused party, that he might aggrieve the said accuser and annihilate his charge, has falsely suggested to bishop so-and-so, that the said accuser has persisted for forty days and more in a certain excommunication, and so that he obtained from the said bishop letters directed to us that we would stretch out our secular arm, through whose deception the said accuser

ad deliberandum eum. Fleta, vi. ch. 45, § 2.

tus est, & in prisona nostra detentus, ut dicit. Et quia nemini debet fraus sua patrocinari, tibi p̃cipimus q̃ si p̃d. talis appellans fecerit te securum de clamore &c. tunc pone p̱ vadium &c. p̃dictum talem appellatum, quòd sit coram &c. inde responsurus. Et interim facias p̃ dictum talem appellantē deliberari à prisona nostra, nisi captus fuerit alia occasione quare deliberari non debeat. Teste &c. Si autē forte captus non fuerit, & judex aliquis malitiosè suggesserit episcopo, q̃ quis excom̄unicatus fuerit, fiat breve vic. de non capiendo talem, ut supra, de p̱hibitionibus.

f. 427 b.

Cap. XXIV.

1. Exceptio ex persona petentis, quia alienigena et ad fidem regis Franciæ.

Est etiam et alia exceptio q̃ tenenti competit ex persona petentis p̱pter defectum nationis, q̃ dilatoria est et non perimit actionem, ut si quis alienigena qui fuerit ad fidē regis Franciæ, et actionē instituat versus aliq̃m qui fuerit ad fidem regis Angliæ, tali non respondeatur, saltem donec t̃ræ fuerint com̄unes, nec etiam sive rex ei concesserit placitare, quia sicut Anglicus non auditur in placitando aliq̃m de terris et tenementis in Francia, ita nec debet Francigena & alienigena, qui fuerit ad fidem regis Franciæ, audiri placitando in Anglia. Sed tamen sunt aliqui Francigenæ in Francia, qui sunt ad fidē utriusq̃, et semper fuerunt ante Normanniā deperditam & post, & qui placitant hic et ibi ea ratione qua sunt ad fidē utriusq̃, sicut fuit W. comes Marr̃ et manens in Anglia, et M. de Feynes manens in Francia, et alii plures, et ita tamen, si contingat guerrā moveri inter reges, rema-

Supra, fol. 415 b.

was seized and detained in our prison, as he says. And because nobody ought to be benefited by his own fraud, we enjoin you that if the aforesaid accuser has given you security concerning his complaint &c., then place such accused party under bail, &c., that he should present himself to us, &c., in order to answer thereon. And meanwhile cause the aforesaid so-and-so the accuser to be delivered out of our prison, unless he shall have been seized upon some other occasion wherefore he ought not to be set free. Witness &c. But if by chance he has not been seized, and some judge has maliciously suggested to a bishop that he has been excommunicated, let a writ go to the viscount not to seize the said person, as above concerning prohibitions.

been seized, a writ to set him free.

Chapter XXIV.

f. 427 b.

There is likewise another exception, to which the tenant is entitled against the person of the claimant, on account of the defect of his nation, which is dilatory and does not perempt the action, as if he be an alien by birth who is of fealty to the king of France, and he brings an action against some one who is of fealty to the king of England, no answer shall be made to such a person at least until the lands shall be common, nor even if the king has allowed him to plead, because as an Englishman is not heard, if he implead any one concerning lands and tenements in France, so ought not a native of France and a born alien who is of fealty to the king of France to be heard, if he impleads any one in England. But still there are some Frenchmen in France, who are of fealty to both, and have always been so before Normandy was lost and afterwards, and who implead both here and there for the reason that they are of fealty to both, such as William the earl Marshall resident in England, and M de Feynes resident in France, and several others, and so however that, if it should happen that war should arise between

1. An exception against the person of the claimant, that he is an alien by birth and of fealty to the king of France.

neat ꝑsonaliter quilibet eorū cum eo cui fecerit ligeantiā, et faciat servitum debitū ei cum quo non steterit in persona.

2. Exceptio contra petentem propter statum dubium multis rationibus.

Competit etiam tenenti exceptio ex ꝑsona petentis ꝓpter statū dubiū, & dubium rei eventū. Status quidem hominis dubius esse poterit multipliciter, tum ꝓpter dignitatis mutationem, ut si quis fuerit in aliqua dignitate constitutus, et electus fuerit vel postulatus ad aliam dignitatē, & cum consensum p̄buerit, pendet status suus quousq; fuerit confirmatus, et sic ratū esse non poterit, quod cum eo actum fuerit pendente statu suo. Itē dici poterit si quis fuerit in aliqua dignitate constitutus, et fuerit in causa depositionis, et meritis suis exigentibus vel non exigentibus, et cùm fuerit depositus juste vel injustè appellaverit, pendente appellatione non valet q̄ cùm eo actū fuerit, quia si teneat depositio omnia erunt revocanda, & sic judiciū delusoriū. Item poterit status esse dubius ꝓpter causam criminalem impositam alicui, ubi vertitur periculum vitæ vel membrorū, in causa civili respondere non tenetur nec ei respondebitur, antequam se defenderit vel non defenderit in causa criminali, quia si prius in causa civili ageretur, convicto crimine retrotrahendum erit tempus usq̄ ad tempus cōmissi criminis, & sic quicquid actum fuerit in medio tempore inter convictionem et crimen cōmissum erit revocandū: et ita cum talibus agi non poterit donec status confirmetur, ut supra de placitis coronæ pleniùs de hac materia. De causa vero depo-

the kings, each of them should personally remain with him to whom he had made allegiance, and let him do due service to him with whom he does not personally array himself.

2. An exception against a claimant on account of his doubtful *status* for many reasons.

The tenant is also entitled to an exception against the person of the claimant on account of his doubtful *status*, and the doubtful event of a matter. The *status* of a man may be doubtful in many ways, as well on account of a change of dignity, as if a person has been established in a certain dignity, and has been elected or demanded for another dignity, and when he has given his consent, his *status* is in suspense until it has been confirmed, and so whatever proceedings have been had with him, whilst his *status* was in suspense, cannot be ratified. The same thing may be said, if a person has been established in a certain dignity, and is involved in a cause of deposition, his merits either requiring it or not requiring it, and when he has been deposed, whether justly or unjustly, he has appealed, pending the appeal what has been transacted against him does not avail, because if the deposition binds him, every thing will have to be revoked, and so the judgment will be illusory. Likewise his *status* may be doubtful on account of a criminal cause imposed on a person, where there is risk of life or members; in a civil cause he is not bound to answer nor shall an answer be given to him before he has defended or failed to defend himself in the criminal cause, because if proceedings were previously had in the civil cause, if he was convicted of a crime the time would have to be referred back to the time of the committal of the crime, and if any proceedings should have been taken in the intermediate time between the conviction and the commission of the crime, they would have to be revoked: and so proceedings cannot be taken against such parties until their *status* be confirmed, as above concerning the pleas of the crown in such matters. Concerning a cause of

Supra, f. 414.

sitionis sumi poterit exēplum de episcopo Bathonensis & abbate de Glastoñ coram justiciar. de banco.

3 Exceptio ex delicto spoliationis, donec fuerit restitutus.

Competit etiam exceptio tenenti ex psona petentis et ex delicto dilatoria, ut si tenens spoliatus fuerit à petente et non restitutus in toto vel in parte, non respondebit tenens ante restitutionem, quia nudi contendere, nec inermes nos inimicis debemus [1] opponere, nec videtur quis restitui qui non in totū restituitur, sicut nec videtur res reddita quæ deterior facta redditur, secundum quod superius videri poterit de spoliatoribus & disseysinis & restitutionibus.

f. 428.

Cap. XXV.

1. Exceptio dilatoria quia jus commune, ita quod sine aliis respondere non potest, vel quia in parte tangit alios sine quibus &c.

Competit etiam exceptio tenenti peremptoria ex persona petentis, et quandoq̃ dilatoria tam ex psona alterius quâm petentis, quia sine alio agere non poterit per se, qui tantundem juris habet quàm ipse qui petit, ut sunt plures participes, vel quia nihil juris habet sine alio sicut vir de re uxoria sine uxore, vel q̃ uxor agere nō poterit sine viro de re ꝑpria, cûm vir sit ei adjunct⁹ et caput uxoris, vel quia petēs actionem non habet aliquam q̃ rem deducere possit in judicium sine aliis, sicut sunt canonici et monachi simplices vel amotibiles sine abbate vel priore. Item decanus & capitulum sine episcopo. Item si petens jus habeat cûm sit cohæres justus et ꝑpinquus, alius tamē majus jus habet quia ꝑpinquior: sicut videri poterit supra in tractatu de assisa mortis antecessoris.

[1] "non debemus," MS. Rawl. C. 160.

deposition an example may be taken concerning the bishop of Bath and the abbot of Glastonbury before the justiciaries of the bench.

3. An exception on account of the offence of spoliation until he has had restitution.

A tenant is also entitled to a dilatory exception against the person of the claimant and on account of an offence on his part, as if the tenant has been spoiled by the claimant and has not had restitution in whole or in part, the tenant shall not answer before restitution, for we ought not to contend naked nor to oppose ourselves unarmed against our enemies, nor does a person seem to have restitution who has not entire restitution, just as a thing does not seem to have been given back, which is given back in a deteriorated state, according to what may be seen above concerning spoilers, and disseysines, and restitutions.

Chapter XXV.

f. 428.

1. A dilatory exception because the right is common, so that he can answer without the others, or because in part it touches others without whom &c.

The tenant is also entitled to a peremptory exception against the person of the claimant, and sometimes also to a dilatory exception against the person of another than the claimant, because he cannot proceed by himself without another, who has as much right as the claimant himself, as there are several co-parceners, or because he has no right without another person, as a husband concerning the property of his wife without his wife, or because a wife cannot proceed without her husband concerning her own property, since the husband is joined to her and is the head of the wife, or because the claimant has no right of action which can bring the thing into judgment without other persons, such as are canons and simple monks who are removable without an abbot or prior. Likewise a dean and canons without a bishop. Likewise if the claimant has a right, when he is a right and near co-heir, but another person has a greater right because he is nearer, as may be seen in the treatise concerning an assise of mortdancester.

2. Exceptio, quod participes habet sine quibus &c.

Sed inprimis dicendum erit de exceptione illa, quæ cõpetit tenenti eo q̃ participes qui tantundem juris habent in brevi nõ nominantur. Et sunt plures participes quasi unum corpus in eo q̃ unum jus habent, et oportet quòd corp⁹ sit integrum, et q̃ in aliqua parte non sit defectus. Et sunt participes quasi partem capiẽtes, sicut partis capaces, ut supra de qualitate et differentia hæredum, eo q̃ communis est inter eos res ratione plurium p̃sonarum, vel ratione vicinitatis, vel ratione ipsius rei q̃ partibilis est, et non ratione p̃sonarũ, quæ non sunt quasi unus hæres & unum corpus, sed diversi hæredes, ubi tenementũ p̃tibile est inter plures cohæredes petentes qui descẽdũt de eodẽ stipite, et semper solet dividi ab antiquo. Possunt autẽ plures p̃ticipes esse et cohæredes petentes, & plures tenentes cohæredes et p̃ticipes, vel unus petens sine p̃ticipe, et plures tenẽtes p̃ticipes, vel unus tenens p̃ticeps vel plures, et plures cohæredes qui nihil inde tenent nec in p̃parte nec in compensatione, et alii qui in p̃parte, et alii in compensatione p̃ p̃te sua. Item possunt esse plures petentes p̃ticipes, vel unus sine participe, et unus tenens sine p̃ticipe, vel plures tenentes qui omninò sibi sunt extranei & non cohæredes, sed p̃ticipes ut vicini. Item plures petentes sine p̃ticipe, vel unus sine p̃ticipe totã hæreditatẽ, sive ibi sint plura maneria sive nõ, sive versus plures p̃ticipes vel extraneas p̃sonas, vel versus unũ vel duos participes, et unũ extraneũ non p̃ticipẽ, totam hæredi-

2. An exception that he has partners without whom &c.

But in the first place we must speak of that exception which is allowable to the tenant on the ground that part-holders who have as much right are not named in the writ. And several part-holders are as it were one body, inasmuch as they have one right, and it is incumbent that the body should be entire and that there should not be a defect in any part. And part-holders are as it were holding a part, as part-capable,[1] as above concerning the quality and the difference of heirs, inasmuch as the thing is common amongst them in respect of several persons, or in respect of vicinity, or in respect of the thing itself which is partible, and not in respect of the persons, who are not as it were one heir and one body, but divers heirs, where the tenement is partible between several co-heirs as claimants who descend from the same stock, and is always accustomed to be divided from ancient time. But there may be several co-parceners and co-heirs claimants, and several tenants co-heirs and co-parceners, and one claimant without a co-parcener, and several tenants co-parceners, or one tenant co-parcener or several, and several co-heirs who hold nothing thereof neither in proportion nor in compensation, and others who hold in proportion and others who hold in compensation for their own part. Likewise there may be several claimant co-parceners, or a single one without a co-parcener, and a single tenant without a co-parcener, or several tenants, who are altogther strangers to one another and not co-heirs, but co-parceners as neighbours. Likewise several claimants without a co-parcener or a single one without a co-parcener to the entire inheritance, whether there be there several manors or none, whether against several co-parceners or strangers to one another, or against one or two co-parceners, and one stranger not a co-parcener, claimants to the entire

[1] The Latin text allows of a play upon the words, *participes, partem capientes*, and *partis capaces*, which it is difficult to render into English.

tatē vel ejus partē. Cùm autē plures sint ꝑticipes coheredes, vel ꝑticipes nō cohæredes petentes, oportet q̃ omnes qui petunt & qui capere debent de re petita nominētur in brī: unde cùm dicat tenens excipiendo, Frater, non teneor ad hoc brē respondere, quia si jus haberes, participes habes qui tantundem juris habent in re quantum et vos, vz. A. & B. Ad quod
f. 428 b. poterit petens replicare & dicere, q̄ omnes qui jus clamare poterunt, vel ꝑtem de tenemento petito, vel de re petita nominati sunt in hoc brevi, & nihil juris ꝑtinet nec ad A. nec ad B. q̄ participes esse possunt, quia A. bastardus est, & B. de servo progenitus, licet de libera participi & conjugata. Et unde A. nullo tēpore capere possit cùm sit bastardus, nec B. cûm sit de servo ꝑgenitus. Itē nec talis particeps fœmina petere non possit ante tempus, cùm sit servo suo copulata. Itē talis fœmina particeps ꝑtem de re petita capere non potest, quia de cōmuni hæreditate tenet quandam ꝑtem in maritagiū suum, nec vult maritagium suum in ꝑtem ponere, ut partem suam per totū habeat de cōmuni hæreditate.

3. Exceptio, quod particeps est ad fidem regis Franciæ.

Item respondere poterit, q̄ particeps de quo dicitur nihil capere potest, quia est ad fidem regis Franciæ, & nihil capere poterit anteq̄m fiat fides regi Anglie, & cùm terræ sint cōmunes et concordes, & ideo non est necesse q̄ in brī nominentur. Item q̄ particeps qui non nominatur, vel aliquis antecessorum suorum feloniam fecerit, ita q̄ particeps esse non possit. Item respondere potest q̄ particeps de quo fit mentio mortuus est sine hærede de se; vel si hæredes habuit, omnes mortui sunt. Item q̄ ille qui ꝑticeps esse debuit totum jus suum q̄ inde habuit cohæredibus suis

inheritance or to a part. But when there are several claimant co-parceners who are co-heirs, or co-parceners who are not co-heirs, it is incumbent that all who claim and who expect to take some part of the thing claimed should be named in the writ; whereupon when the tenant says in excepting, "Brother, I am not bound " to answer to this writ, because, if you have the right, " you have co-parceners who have as much right in the " thing as you have, to wit, A. and B.," to which the claimant may reply and say, that all who can claim a f. 428 b.
right or a part of the tenement claimed, or a part of the estate claimed, have been named in this writ, and no right pertains neither to A. nor to B. that they can be co-parceners, because A. is a bastard and B. was begotten by a serf, although of a free woman a co-parcener and married. And wherefore A. can at no time take since he is a bastard, nor B. since he is begotten by a serf. Likewise such female co-parcener cannot claim before a certain time, since she is coupled to a serf. Likewise such female co-parcener cannot take a part of the thing claimed, because she holds a certain part of the common inheritance as her marriage portion, nor is she willing to put her marriage portion into partition, that she may have her part of the whole as of a common inheritance.

3. An exception, that the co-parcener is of fealty to the king of France.

Likewise he may answer that the co-parcener who is spoken of can take nothing, because he is of fealty to the king of France, and he will be able to take nothing before he has sworn fealty to the king of England, and when the lands shall be common and concordant, and accordingly it is not necessary that they should be named in the writ. Likewise that the co-parcener who has not been named or some one of his ancestors has committed felony, so that he cannot be a co-parcener. Likewise he may answer that the co-parcener of whom mention is made has died without an heir of his body, or if he had heirs they are all dead. Likewise that he who ought to be a co-parcener has released and quit-

remisit, & quietum clamavit. Ad primam vero replicationē petentis, q̄ pticeps nō nominatur quia bastardus est, triplicari poterit à tenente q̄ sit nominandus, quia incertum est adhuc utrum se possit p̄bare legitimū vel non. Eadem vero responsio esse poterit replicando de servo non nominato. Ad hoc autē q̄ dicit̄ q̄ fœmina particeps nominari non debet cū sit servo copulata, ad hoc poterit triplicari q̄ nominari debet, quia si ad p̄sens capere non possit, capere possit ad temp^{o}, quia servus mori poterit. Ad hoc autem q̄ dicitur, q̄ fœmina particeps non nominata tenet quandam p̄tem hæreditatis in maritagium, nec vult maritagium ponere in p̄tem, ad hoc poterit à tenente replicari q̄ adhuc in voluntate sua est & electione utrū hoc facere voluerit vel non, & ideo in brevi nominanda. De hoc autē quod dicit de participe qui est ad fidem regis Franciæ, triplicari poterit à tenente quòd nominādus est, quia terræ possunt esse cōmunes. Ad hoc autem q̄ dicitur, quòd particeps mortuus est sine liberis, vel si liberos habuerit, omnes mortui sunt, quia dubitari possit an ita sit vel non, detur alius dies ut fiat certificatio, & secundum hoc aut cadat breve aut stet: de hoc autem quod dicit quòd particeps remisit, quia de hoc dubitari poterit, detur alius dies ut supra, & summoneatur particeps quòd sit ibi ad ostendendum, si quid juris clamet cum aliis participibus de tali hereditate, quia si talis remisit participibus, pars illa accrescet aliis. Et illud idem (secundum quosdam) posset dici de bastardo & servo petentibus non nominatis, quod quidam non admittunt. Et notandum, q̄

claimed to his heirs all the right which he had therein. But to the first reply of the claimant that the co-parcener is not named because he is a bastard, it may be rejoined by the tenant that he ought to be named, because it is uncertain at present whether he can prove himself to be legitimate or not. But the same answer may be made in replying concerning a serf not having been named. But to this which is said that a female co-parcener ought not to be named since she is coupled to a serf, to this it may be rejoined that she ought to be named, because if she cannot take at present, she may take at some future time, because the serf may die. But to this which is said that a female co-parcener not named holds some part of the inheritance as a marriage portion, and is not willing to put her marriage portion into partition, to this it may be replied by the tenant that it is still at her own option and choice whether she will do this or not, and therefore she is to be named in the writ. But to this which is said concerning a co-parcener who owes fealty to the king of France, it may be rejoined by the tenant that he ought to be named, for the territories may become common. But to this which is said, that a co-parcener has died without children, or if he had children, they are all dead, because it may be doubted whether it be so or not, let another day be granted that a certificate may be produced, and according to this let the writ stand or fall: but concerning this which is said that the co-parcener has released, because there may be doubts about this, let another day be granted as above, and let the co-parcener be summoned that he be present there to show if he claims any right with the other co-parceners in such inheritance, because if the said person has released to his co-parceners, his part will accrue to the others. And the same thing (according to some) may be said concerning a bastard or a serf as claimants and not named, which some do not admit. And it is to be noted that

Fleta, vi. c. 48, § 4. sunt quidam participes qui statim agere possunt & capere, & alii qui statim agere sed nihil capere possunt ante tempus, sicut fœmina copulata servo, & ille qui fuerit ad fidem regis Franciæ, & nominari debent omnes. Et sunt quidam qui aliquando capere poterunt & nunc capere non poterunt, quia ex delicto &
f. 429. felonia facti sunt non capaces, sicut p̄ crimine dānati, et tales nominare nō oportet. Sed omnes nominandi sūt de quibus certū est vel dubiū utrū capere possint vel non, quia in dubio in benignā p̄tem erit interp̄tādū, vz. q̄ capere possint, donec p̄betur in cōtrariū. Si autem certū sit q̄ capere nō poterit sicut videt̄ de felone, nec pars illius accrescere poterit p̄ticipibus, sed dñis capitalibus, et ideo de eo nihil p̄tinet ad p̄ticipes. Itē nihil accrescet participibus de p̄te eorū qui post tēpus capere poterint, sed cum tenēte capitali vel capitali dño remanebit pars talium quousque capere possunt (secūdum quosdā), sed (secūdum alios) videt̄ q̄ nō, quia cûm oporteat eos in bŕi nominare et p̄cedat loquela et judiciū sub nomine eorū, videt̄ q̄ recuperare debeāt inter alios, & cū judiciū redditū sit p̄ eis, oportebit q̄ in p̄sonis eorū fiat executio, et sic poni debēt in seysina sicut et alii. Sed cùm seysinā habuerint, quis ejiciet eos? quia si sine judicio ejicianť à p̄ticipib⁹ vel ab aliis, de jure seysinā recuperabūt. Si vero à p̄ticipibus implacitentur, cadit actio de jure, quia p̄ticipibus nihil potest accrescere, & ita nihil juris habent nec aliquid petere poterūt ratione custodiæ. Sed quid ergo fiet videndū est in sequētib⁹.

there are some co-parceners who can forthwith proceed and take, and others who can forthwith proceed but can take nothing for some time, as a woman coupled to a serf, and he who may be of fealty to the king of France, and they ought all to be named. And there are some who will be able to take at a certain time and now are not able to take, because from an offence and a felony they have been made incapable, such as persons f. 429. condemned for a crime, and such persons ought to be named. But all ought to be named, concerning whom it is certain or doubtful whether they can take or not, because in a doubtful case the interpretation should be on the benignant side, namely that they can take, until it be proved to the contrary. But if it be certain that he cannot take, as seems to be the case with a felon, his part will accrue not to his co-parceners but to his chief lords, and accordingly nothing of it pertains to the co-parceners. Likewise nothing will accrue to the co-parceners of the share of those, who will be able to take after a time, but their parts will remain with the chief tenant or with the chief lord until they are able to take (according to some), but (according to others) it appears that it is not so, because since it is incumbent that they should be named in the writ and the argument and the judgment should proceed in their name, it seems that they ought to recover amongst the others, and when judgment has been rendered for them, it will be incumbent that execution should be made in their persons, and so they ought to be placed in seysine just as the others. But when they have got seysine, who shall eject them? Because if they be ejected without a judgment by their co-parceners or by others, they shall of right recover seysine. But if they be impleaded by their co-parceners, the action falls of right, because nothing can accrue to co-parceners, and so they have no right, nor can they claim anything on the grounds of guardianship. But what then shall be done is to be seen in what follows.

4. Cum particeps sine participe obtinuerit per fraudem, et per fraudem sequi noluerit.

Sed quid cū ꝑticipes plures extiterint et capaces, et quidā eorū petāt & obtineant sine aliis qui nō nominantur in bři, nō nominatis cōsuli poterit ꝑ officiū judicis ꝑpter fraudē. Itē cùm plures sint ꝑticipes & omnes nominati & quidā sequi noluerint, nihilominus tenebit bře, quia satisfactū est impetrationi, & tales qui nō venerint sum̄oneātur, ꝙ sint ad sequēdū cū ꝑticipibus si voluerint. Si autē sequi noluerint, alii nihilominûs sequātur de ꝑte sua, bře sum̄onitionis tale erit.

5. De summonendo participes.

Rex vic. salutē. Sum̄oneas ꝑ bonos sum̄onitores A. & B. ꝙ sint corā justic. nr̄is tali die et loco, ad sequēdū cū C. & D. de tāta ťra cum ꝑtinētiis in tali villa, & unde p̃dicti D. & C. clamāt duas ꝑtes versus E. ut rationabilē ꝑtē suā, q̃ eos cōtingit de hæreditate talis cujus hæredes ipsi sūt. Et unde p̃dictus E. dicit ꝙ nō vult p̃dictis C. & D. respōdere sine p̃dictis A. & B. ut dicit, & habeas ibi sum̄onitores & hoc bře. Teste &c.

6. Si unus de participibus moriatur, cum omnes in brevi nominentur.

Itē cùm oēs nominati sūt & agere inceperint simul, et unus eorū moriatur, cadit bře, & de novo incipere oportet ꝑ aliud bře in ꝑsona hæredis statim vel post tēpus, secūdū qđ hæres fuerit infra ætatē vel nō. Sed quid si unus ex ꝑticipib⁹ cū agere inceperit feloniā fecerit, vel leprosus devenerit, furiosus, vel nō sanæ mentis, videndū utrū remanere debeat loquela vel ꝓcedere, sive fuerit petēs vel tenens.

But what if when there are several co-parceners capable of suing, and some of them claim and obtain without the others who are not named in the writ, the interest of those who are not named may be consulted through the office of the judge on account of the fraud. Likewise when there are several co-parceners and all are named and some are unwilling to sue, nevertheless the writ will hold good, because the suing out of it is satisfied, and let such as have not come be summoned, that they should attend to sue with their co-parceners, if they are willing. But if they shall be unwilling to sue, let the others nevertheless sue for their share. The writ of summons will be of this nature.

4. When a coparcener without fellow coparcener has obtained through fraud, and through fraud is unwilling to sue.

The king to the viscount greeting. Summon by good summoners A. and B. that they present themselves before our justiciaries on such a day and at such a place, in order to sue with C. and D. concerning so much land with its appurtenances in such a vill, and whereof the aforesaid D. and C. claim two parts against E. as their reasonable part, which belongs to them from the inheritance of such a person whose heirs they are. And whereof the aforesaid E. says that he does not choose to answer to the aforesaid C. and D. without the aforesaid A. and B. as he says, and have there the summoners and this writ. Witness &c.

5. Of summoning co-parceners.

Likewise when all are named and have commenced proceedings together, and one of them dies, the writ abates, and they must commence again afresh by another writ in the person of the heir forthwith or after a time, according as the heir is under age or not. But what if one of the co-parceners when he has commenced proceedings should commit felony, or have become leprous, or mad, or of unsound mind, it is to be seen whether the hearing should be stayed or should proceed, whether it be the claimant or the tenant.

6. If one of the co-parceners dies, when all are named in the writ.

7. Cum unus ex participibus totam teneat hæreditatem.

Fleta, vi. c. 48. § 5.

Cū autē plures sint cohæredes & pticipes, & un⁹ vel plures totā teneāt hæreditatē, & pticeps un⁹ vel plures petat versus unū pticipem tenentē vel plures, si plures petāt, nō est necesse oēs nominari in uno bñi, quia diversæ sūt actiones, quia quilibet petat ptē suā, ppriā, q̃ eū cōtingit sine alio pticipe, ac si un⁹ pticeps peteret versus unū vel plures pticipes una erit actio, & quo casu tenens[1] pticeps visū non habebit, quia divinare nō poterit q̃ pars ei accidere poterit de communi hæreditate, poterit tamē ei fieri qđ tantundem valet, ut si dicat, rationabilē peto ptem meā q̃ me contingit de tota hæreditate, unde talis antecessor meus obiit seysitus ut de feodo.

8. f. 429 b. Si hæreditas partita sit inter participes.

Cōtingit autē quādoq̃ qm divisa sit hæreditas inter participes, & cùm quis ptem suam habuerit, à possessione sua ceciderit, vel q donationem fecerit sub conditione aliqua, per qm post tempus esse poterit q ad ipsum sit reversura, et cùm per conditionem ad ipsum reverti debeat, alius injuste se ponat in seysinam, & tenens ei objecerit q participes habuerit, exceptio illa non valebit, quia postquàm pticeps in seysina fuerit, & terrā de facto suo incumbravit, nihil de hoc ad cohæredes vel participes, non magis de dāno quàm de lucro.

9. Sunt qui tenent terram in communi, sed non ut participes.

Sunt etiam qui tenent in cōmuni rem aliquam de cōmuni consensu sicut pticipes & capaces, sed non tamen ut cohæredes, ut si de communi consensu aliquam vastitatem p cōmuni cōmodo reliquerint ad pasturā vel aliud cōmodum vel alium usum, si forte petant, eadem erit exceptio contra ipsos q̃ & contra hæredes, q nullus

[1] "petens" seems to be required by the context, but "tenens" is the reading of the MSS.

But when there are several coheirs and co-parceners, and one or more hold the entire inheritance, and one or more co-parceners claim against one or more tenant co-parceners, if several claim, it is not necessary that they should all be named in one writ, because there are divers actions, because any one may claim for his own proper part, which belongs to him, without another co-parcener, as if one co-parcener should claim against one or more co-parceners there will be one action, and in which case the tenant co-parcener will not be allowed a view, because he cannot divine which part ought to fall to him from the common inheritance, there can however be done for him what is equivalent, as if he should say, I claim my reasonable part of the entire inheritance, whereof my ancestor died seysed as of fee.

7. When one of the co-parceners holds the entire inheritance.

It happens however sometimes that, when the inheritance has been divided amongst the co-parceners, and when a person has had his part, he has fallen from the possession of it, either because he has made a donation of it under a condition, in virtue of which after a time it may happen that it will revert to him, and when in accordance with the condition it ought to revert to him, another person unjustly puts himself into seysine, and the tenant has objected to him that he has co-parceners, that exception will not avail, because after a co-parcener has been in seysine and has encumbered the land by his own act, nothing of this regards his coheirs or co-parceners, no more for loss than for gain.

8. If the inheritance has been parted amongst the co-parceners. f. 429 b.

There are also persons who hold an estate in common of their common consent as co-parceners and capable, but not however as coheirs, as if of their common consent they have left a quantity of waste land for their common advantage for pasturage or for some other advantage or for some other use, if they by chance claim, there will be the same exception against them as against coheirs, that no one of them can sue or answer without the

9. There are persons who hold land in common, but not as coheirs.

sine alio agere possit nec respondere. Res quidem cōmunis esse poterit inter plures multis rationibus, ut supra, sicut sunt divisi et hæredes.

10. Exceptio, quod viro non respondetur, cujus hæreditas sit terra.

Datur etiā exceptio dilatoria tenēti, nō ex ꝑsona petentis q̄ agere non possit, sed ex ꝑsona adjuncti sine quo petere nō potest, et qui non sunt ꝑticipes quasi ꝑtem capientes, quia res q̄ petitur inter petentes cùm evicta fuerit non capit divisionē, sicut inter virum et uxorem qui sunt quasi unica ꝑsona, quia caro una & sanguis unus. Res tamen ꝑpria uxoris, et vir ejus custos, cûm sit caput mulieris, et in quo casu nō respondebitur viro sine uxore nec è contrario. Item datur exceptio tenenti peremptoria quoad petentē, sed non ad eum qui jus habet, ut si quis petat nomine suo rem, qui petere deberet rem nomine alieno, ut si servus fructuarius qui non habet actionē, et sicut simplex canonicus vel simplex monachus, quia amotibiles sunt et ꝑpetuitatem non habent, et in quo casu cadit actio & br̃e in ꝑsona talis, et tenet actio in ꝑsona alterius ꝑ aliud breve.

11. Exceptio, quod sine assensu talis superioris.

Itē datur exceptio dilatoria tenenti contra petentē, licet actio tota ad ipsū ꝑtineat, ꝑpter autoritatē superioris, sine cujus assensu & autoritate petere non possit, sicut decanus & capitulū trāsigere non possunt nec pacisci nec mutare statū suū, sicut nec rectores ecclesiæ de rebus ecclesiæ sine cōsensu episcopi: et plures sunt exceptiones aliæ, q̄ cōpetunt tenenti cōtra petentē p̄dictis rationibus, et de quibus ad p̄sens nō recolitur.

other. An estate may be common amongst several persons in many ways, as above stated, just as heirs likewise are divided.

10. An exception that an answer is not given to the husband, whose inheritance the land may be.

A dilatory exception is also allowed to a tenant, not against the person of the claimant that he cannot sue, but against the person of an adjoint, without whom he cannot claim, and who are not part-holders as it were holding a part, because the estate which is claimed, when it has been recovered by the action, does not admit of division, as between a husband and his wife, who are as it were one person, being one flesh and one blood. But it is the proper estate of the wife, and the husband is the guardian of it, since he is the head of the woman, in which case an answer shall not be made to the husband without the wife, nor contrariwise. Likewise a peremptory exception shall be allowed to the tenant as regards the claimant, but not against him who has the right, if any one claims in his own name a thing which he ought to claim in another's name, as if a serf-steward who has no right of action, and as a simple canon or a simple monk, who are amovable and have no perpetuity, and in which case the action abates and the writ in the person of such an one, and the action holds good in the person of the other by another writ.

11. An exception, that without the assent of such a superior.

Likewise a dilatory exception is allowed to a tenant against a claimant, although the entire action pertains to him, on account of the authority of a superior, without whose assent and authority he cannot claim, just as a dean and chapter cannot transact nor bargain nor change their *status*, just as no more can the rectors of a church concerning the things of the church without the consent of the bishop: and there are several other exceptions which are available to a tenant against a claimant for the reasons aforesaid, and which do not occur to the memory for the moment.

Cap. XXVI.

1. De exceptionibus, quæ competunt tenenti ex persona propria.

Dictum est supra de exceptionibus quæ competunt tenenti ex persona petentis, nunc autem dicendum de exceptionibus quæ competunt ipsi tenenti ex ꝑsona sua ꝑpria. Competit quidem ei exceptio minoris ætatis, ꝙ ante ætatē non respondeat, non magis quàm petens agere possit cōtra eum ante ætatē, secundū ꝙ superius dictū est de minori ætate. Et secundum hoc videri poterit quid agendū sit hic. Item respondere nō teneatur, quia non est in seysina nomine ꝑprio sed nomine alieno, et ideo non potest in judicium rem deducere.

f. 430. Item cōpetit ei exceptio ex ꝑsona sua ꝑpria sicut cōtra petentem ex statu dubio et dubio rei eventu ut supra. Item cōpetit ei exceptio ex persona sua ꝑpria, quòd sine aliis respondere non potest, qui tantundem juris habent in re quam tenet sicut et ille, vel ratione adjuncti, vel ratione majoritatis ut supra. Sed ad hoc quòd exceptionē habeat quoad actionem differendam et breve posternendum, secundum quod participes nominandi sunt in brevi vel non nominati, videndum erit an partita sit inter cohæredes vel non cohæredes ꝑticipes hæreditas vel res cōmunis vel nō. Si autem hæreditas non fuerit partita sed teneatur in cōmuni, quilibet cohæredū tantundē juris habet tenendi hæreditatē quantū & alii: sed tamen non ꝑ se ante divisionē, sed ꝑ se in cōmuni cū aliis, et sic totū tenet et nihil tenet, s. totū in cōmuni, & nihil sep̃atim ꝑ se. Cûm autem tenens ita excipiat quòd non teneatur sine ꝑticipibus respondere, videndū est inprimis si hæreditas partita

Chapter XXVI.

We have spoken of exceptions which are available to the tenant against the person of the claimant, now we must speak of exceptions which are available to the tenant upon his own proper person. There is available to him an exception of minor age, that he should not answer before he is of full age, no more than the claimant can bring an action against him before he is of full age, according to what has been said above concerning minority. And according to this it may be seen what is to be done here. Likewise he is not bound to answer, because he is not in seysine in his own name, but in another's name, and accordingly he cannot bring the thing into judgment. Likewise an exception is available to him upon his own person as against a claimant from his doubtful *status* and the doubtful result of a matter as above. Likewise an exception is available to him upon his own person, that he cannot answer without others, who have as much right in the thing which he holds as himself, either by reason of being an adjoint, or by reason of majority as above. But for the matter of his having an exception as regards the deferring the action and the overthrowing the writ, according as co-parceners are to be named in the writ or are not named, it will have to be seen whether the inheritance has been parted amongst co-parceners who are coheirs, or are not coheirs, or whether it is an estate common amongst them or not. But if the inheritance has not been parted amongst them, but is held in common, each of the coheirs has as much right to hold the inheritance as the others, but not by himself before a division, but by himself in common with the others, and so he holds the whole and he holds nothing, to wit, the whole in common and nothing separately by himself. But when the tenant thus excepts that he is not bound to answer without his coparceners, it is to be seen in the

1. Of exceptions, which are available to the tenant upon his own person.

f. 430.

sit vel non. Si autē partita sit, & tenens teneat rem petitam sic partitā & in ꝑparte, non est necesse quòd omnes participes in brevi nominentur, quia si in bñi nominētur illi qui nihil tenent, cadit breve: ut ꝑbatur de termino S. M. añ regis Henr̃ decimoquinto in coñ Essex. Assisa utrum de J. ꝑsona de Messe et Radulpho de Ardern et uxore sua et eorū ꝑticipibus. Ad idē facit de comitissa Oxoñ & W. Blundo & uxore sua, quia recessum est à cōmuni, sed tamen sine participibus suis non tenet̃ petenti respondere, et si sine eis responderet et amitteret, regressum non haberet erga participes ad damnum suum restaurandum in aliqua contributione facienda, sed hoc sibi ipsi & negligentiæ suæ posset imputare. Sed licet non sunt nominati, tamē oportet q̄ vocentur cùm tenens sine illis respondere non teneatur. Sum̄oniri igitur debet per hoc breve. Rex vicecoñ salutem. Sum̄oneas ꝑ bonos summonitores A. B. quòd sint coram justic. &c. ad respondendum C. simul cum D. de tanta terra cum pertinentiis in tali villa vel in tali coñ, vel de tanto terræ cum pertinentiis in alio coñ quam idem C. in curia nostra &c. clamat ut jus suum versus prædictum D. et sine quibus prædictus D. nō vult respondere eidem C., cùm p̃dicti A. et B. sint participes ipsius D. de p̃dicta terra &c. et quo casu si venerint, respondeant cum ipso D. si voluerint, si autem non, nihilominus ꝓcedat loquela. Et in hoc casu sive venerint sive non, et tenens amiserit, ꝑ æqualibus portionibus facient tenenti

first place if the inheritance has been parted or not. If indeed it has been parted, and the tenant holds the estate claimed so parted and in proportion to his part, it is not necessary that all the co-parceners should be named in the writ, because, if those who hold nothing should be named in the writ, the writ abates, as is proved in St. Michael's term in the fifteenth year of king Henry in the county of Essex. An assise utrum concerning J. the parson of Messe and Ralph de Ardern and his wife and their co-parceners. To the same effect is the case concerning the countess of Oxford and William Blundus and his wife, because they had withdrawn from the common holding, but nevertheless one is not bound without one's co-parceners to answer to the claimant, and if one should answer without them and lose, he would not have a right of recourse against his co-parceners in order that they should make good his loss by making a certain contribution, but this he might impute to himself and his own negligence. But although they are not named, nevertheless it is incumbent that they should be called, since the tenant is not bound to answer without them. They ought therefore to be summoned by this writ. The king to the viscount greeting. Summon by good summoners A. and B. that they be present before our justiciaries &c. to answer to C. together with D. concerning so much land with its appurtenances in such a vill or in such a county, or of so much land with its appurtenances in another county, which the said C. in our court &c. claims as his right against the aforesaid D., and without whom the aforesaid D. is unwilling to answer to the said C., since the aforesaid A. and B. are co-parceners of the said D. in the said land &c., and in which case if they have appeared, let them answer with the said D. if they will, but if not, nevertheless let the hearing proceed. And in this case whether they appear or not, and if the tenant has lost, let them in equal portions make compensation to the tenant. And that

excambiū. Et q̄ participes nō nominati ita sum̄oneri debent, p̄batur de termino S. Michaelis anno regni regis H. nono incipiente decimo in com̄ Eborum et Lync. de Adam Tusset.

2. Quod oportet, quod omnes nominentur petentes, licet respondere possunt quod quidam sunt bastardi, et quidam villani, et hujusmodi. f. 430 b.

Si autē hæreditas communis partita non sit, oportet de necessitate quòd omnes nominentur in brevi, alioquin cadit breve ex toto. Si autē à petente ita fuerit replicatum, q̄ non est necesse omnes nominare rationibus paulo antedictis, quia omnes illorū vel quidā bastardi sunt vel mortui cùm masculi sunt, vel si fœminæ, quòd q̃dam bastardæ et q̃dam villanis maritatæ, & quædam villanæ q̃ non nominantur, item quædam contulerunt se religioni, breve in pendente erit & actio, donec de veritate constiterit. Inprimis cùm dicatur, quòd absens sit bastardus, summoneatur per breve in forma supradicta, quòd sit corā justic. ad certos diem & locū ad ostendēdū quid juris clamat in tanto terræ cum p̄tinentiis in tali villa, quam talis clamat versus talem ut jus suū, vel per assisam mortis antecessoris. Et unde idem talis, s. petens dicit q̄ bastardus est, et quòd nihil juris clamare potest in p̃dicta terra. Et de hac materia inveniri poterit de termino S. Trinitatis anno regni regis H. quarto in comitatu Somerset. Si autem dubitetur an particeps non nominatus sit mortuus vel non, detur alius dies, ut interim inquiratur veritas: ut de itinere M. de Pateshull in comitatu Kanc. anno regni regis H. decimo tertio, de W. filio Roberti. Item refert de tenente cûm tenuerit pro diviso facta partitione, et ille moriatur qui de re petita nihil tenet, an cadat actio per mortem talis, ac si ille qui teneret rem moreretur? Revera non cadit, non magis quàm si

co-parceners not named ought to be thus summoned is proved in St. Michael's term in the ninth and tenth years of the reign of king Henry in the counties of York and Lincoln concerning Adam Tussel.

2. That it is incumbent that all the claimants be named although they may answer that some are bastards, and some villeins and such like.

But if the common inheritance has not been parted, it is incumbent of necessity that all should be named in the writ, otherwise the writ abates altogether. If it has been so replied by the claimant that it is not necessary to name them all for the reasons stated shortly above, because all or some of them are bastards or are dead, when they are males, or if they are females that some are bastards and some are married to villeins, and some are villeins who are not named, likewise some have betaken themselves to a religious profession, the writ and the action will be hung up, until the truth has been ascertained. In the first place when it is said that a bastard is absent, let him be summoned in the form above stated, that he should appear before the justiciaries on a certain day and at a certain place, to show what right he claims in so much land with its appurtenances in such a vill, which so-and-so claims against so-and-so as his right by an assise of mortdancester. And whereupon the said so-and-so, the claimant, says that he is a bastard, and that he can claim no right in the said land. And on this matter a case will be found in Holy Trinity term, in the fourth year of the reign of king Henry, in the county of Somerset. But if it be doubted whether a co-parcener who has not been named is dead or not, let another day be given, that the truth may be in the meantime inquired into: as in the iter of Martin de Pateshull in the county of Kent, in the thirteenth year of king Henry, concerning W. the son of Robert. Likewise it matters for the tenant when he holds a divided share, a partition having been made, and he dies who holds nothing of the estate claimed, whether the action abates on account of the death of such person, as if he who held the estate should die? In truth it does not abate, no more than if a warrantor

f. 430 b.

warrantus vocatus moreretur, sed stat breve, & ibi incipiendū. Si autem moriatur nominat[9], cadit: sed si idē qui non nominatur habeat talem hæredem infra ætatē, expectabitur hæredis ætas. De hoc autem quod dicitur de maritata villano, quòd si talis non nominetur cadit breve ut supra dictum est, et si nominetur tenet et procedit placitū de aliis, illa tamē ad tempus à petitione exclusa est quousquè villanus mortuus fuerit: ut de itinere M. de P. in comitatu Lincolñ anno regni regis H. decimo de Hugone de Hull. Et ad hoc facit de itinere Roberti de Vere comite Oxoñ et M. de Pateshull anno regni regis H. quinto in comitatu Hertford, assisa mortis antecessoris si W. de Ludwich. Et quòd cadat breve si non fuerit nominata, inveniri poterit de eodem itinere in eodē coñ, assisa mortis antecessoris de Matilda filia Godwini, & est ratio ibi assignata, quia villanus mori potuit. Item de ꝑticipe absente, de quo replicatur q villanus est, suꝰmoneatur q sit ad ostendendum quid &c. Item de hoc q dicitur q particeps cōtulit se religioni & ita mortuus seculo, constare poterit per literas episcopi utrum redire possit ad seculum vel non, secundum quod susceperit habitum ꝓbationis vel ꝓfessionis. Et de hac materia inveniri poterit de termino S. Trinitatis anno regis H. quarto in coñ South. de Johanne de Brywes. Item esto q particeps in prisona detineatur quòd venire non possit. Item si tali infirmitate detentus vel ab hostibus captus nihilominûs oportet eum nominare, & cùm nominatus fuerit, supersedendum erit quousquè venire possit. Si autē imprisonatus fuerit particeps nominatus ꝑpter feloniā, de qua sit in periculo vitæ vel membrorum, remaneat loquela sine die quousque constiterit de ejus

who had been vouched should die, but the writ stands, and it must there commence. But if the person named should die, it abates, but if the said person who is not named has a certain heir under age, the full age of the heir shall be awaited. But concerning that which is said of a woman married to a villein, that if such a person is not named the writ abates as above said, and if such person be named the writ holds good and the plea proceeds concerning the others, she, however, is for a time excluded from claiming until the villein be dead: as in the iter of Martin de Pateshull, in the fifth year of the reign of king Henry, in the county of Hertford, an assise of mortdancester, if W. de Ludwich. And that the writ abates, if she be not named, may be found in the same iter in the same county, an assise of mortdancester concerning Matilda the daughter of Godwin, and the reason there assigned is, that the villein might die. Likewise concerning an absent coparcener, concerning whom it is replied that he is a villein, let him be summoned that he be present to show what, &c. Likewise concerning that which is said that a coparcener has betaken himself to a religious profession and so is dead to secular life, it may be ascertained through letters from the bishop whether he can return to secular life or not, according as he has put on the dress of probation or of profession. And on this matter a case may be found in Holy Trinity term, in the fourth year of king Henry, in the county of Southampton, concerning John de Brywes. Likewise let it be that a coparcener is detained in prison, so that he cannot come. Likewise if detained by such an infirmity or taken captive by enemies, nevertheless it is incumbent to name him, and when his name has been mentioned he may be dispensed with until he can come. But if a coparcener who is named has been imprisoned for felony, for which he may be in danger of life or members, let the hearing of the cause be stayed without a day, until it has been settled concerning his

deliberatione vel damnatione: ut de itinere W. de Ralegh in coñ Bed de Juliana de Nodariis. Ita suspenditur br̃e et loquela, si unus ex ꝑticipibus fuerit infra ætatē, donec ad ætatē ꝑvenerit.

3. Si particeps surdus fuerit vel mutus.

Sed quid dicetur de ꝑticipe qui naturaliter surdus fuerit et mutus, videtur q̄ talis omni tempore ꝑ non hærede & ꝑ non participe haberi debeat. Et ideo sive nominetur sive non, non cadit actio nec breve. Sed tenet tam in persona petentis quàm in persona tenentis quantum ad omnes. Si autem à casu venerit surditas vel non venerit & q̄ mutus fuerit, expectandum erit ꝑ aliquod tempus, si spes habeatur de convalescentia. De adjuncto vero et superioris consensu, qualiter fieri debeat in ꝑsona tenentis, ꝑpendi poterit ꝑ ea quæ superius dicta sunt in persona petentis. Et
f. 431. notandum quòd licet non capaces hæredes nominentur, vel fortè penitus extranei, non tamē ꝑpter hoc cadit br̃e, sed stabit in ꝑsonis aliorū qui jus habent, quia in hoc tali casu utile non vitiatur ꝑ inutile. Notandum est etiam q̄ plures participes petere possunt tenendi in cōmuni à pluribus qui separatim tenent, et qui sese in nullo contingunt, et hic plures erunt actiones ꝑpter pluralitatem ꝑsonarum. Et vice versa plures non participes quorum jura separata sunt, petere possunt versus plures cohæredes & ꝑticipes, & similiter erunt hic actiones plures et diversæ. Item possunt plures cohæredes & ꝑticipes petere versus plures cohæredes et ꝑticipes, et hic erit unica actio ꝑpter unitatem juris.

4. Si tenenti competat

Si autem non sit exceptio q̃ competat tenenti contra petentem, nec ex persona petentis nec ex ꝑsona

release or his condemnation, as in the iter of William de Ralegh in the county of Bedford, concerning Juliana de Nodariis. Likewise the writ and the hearing of the cause are suspended, if one of the coparceners should be under age, until he should have arrived at full age.

3. If a coparcener be deaf or dumb.

But what shall be said of a coparcener who is naturally deaf or dumb, it seems that such a person ought to be accounted at all times as not an heir and as not a coparcener. And accordingly whether he be named or not, neither the action nor the writ abates. But it holds good as well in the person of the claimant as in the person of the tenant as regards all persons. But if the deafness has arisen from accident or has not arisen and he is dumb, they must wait some time, if hope can be entertained of his convalescence. But concerning an adjoint person and the consent of a superior, how it ought to be dealt with in the person of a tenant, may be ascertained through what has been said above in the person of a claimant. And it is to be noted that although heirs not capable be named, or by chance entire strangers, nevertheless the writ does not abate for that reason, but it shall stand in the person of the others who have right, because in such a case as this the valid is not vitiated by the worthless. It is to be noted also that several coparceners may claim to hold in common from several who hold separately, and who do not touch each other in any respect, and here there will be several actions on account of the plurality of persons. And conversely several persons not coparceners, whose rights are separate, may claim against several coheirs and coparceners, and in like manner there will be here several and divers actions. Likewise several coheirs and coparceners may claim against several coheirs and coparceners, and here there will be a single action on account of the unity of right.

f. 431.

4. If an exception as

If however there be no exception which is available to the tenant against the claimant, neither as regards the

exceptio ex ipsa re.

suo ꝑpria, firmato sic judicio ex persona judicis, petētis & tenentis, cùm judicium sit trinus actus trium ꝑsonarum, videndum erit an sit aliqua quæ competat tenenti ex ipsa re q̃ petitur, si corporalis fuerit & īmobilis sicut terra, tenementum, vel redditus qui ꝑveniat ex tenemento.

5. Oportet, quod petens designet rem quam petit cum pertinentiis.

Oportet igitur inprimis, quòd petens rem designet quam petit, videlicet qualitatem, ut sciatur utrum petatur terra vel redditus cum ꝑtinentiis. Item quantitatē, utrum videlicet sit plus vel minus q̃ petitur. Certam enim rem oportet deducere in judiciū, ne contingat judicium esse delusoriū vel obscurum, quia de re incerta in judicium deducta certa fieri non poterit sententia, licet quandoq̃ de incerta re agatur. Judex sive justic. (in quātum ei possibile fuerit) certum debet ꝑferre judicium. Specificare autem poterit sic, ut si dicat: Peto versus talem tot maneria, quandoque cum ꝑtinentiis, quandoq̃ sine. Item tot feoda militum cum ꝑtinentiis. Item tot carucatas terræ, tot virgatas, tot acras, tot selliones. Item tot libratas terræ, tot solidatas, tot bovatas secundum diversitatē tenementorum, & secundū q̃ in brevibus de recto & de ingressu continetur, et ita q̃ narratio bŕi conveniat, à quo si discordet & brevi non conveniat narratio, amittit petens, quia non admittitur variatio. Admittitur tamen variatio quandoque, dum tamen dicat simile, ut si cōtineatur in bŕi q̃ petit duas carucatas, q̃ ꝑ annum valent decē li-

person of the claimant nor as regards his own proper person, the judgment being thus assured as regards the person of the judge, of the claimant and of the tenant, since the judgment is a triple act of the three persons, we must see if there is any exception available to the tenant as regards the thing itself which is claimed, if it be corporeal and immovable as land, a tenement, or a rent which arises from a tenement.

regards the thing itself is available to the tenant.

It is incumbent in the first place that the claimant should designate the thing which he claims, to wit, the quality of it, that it may be known whether land or a rent with its appurtenances is claimed. Likewise the quantity of it, whether forsooth it be more or less than is claimed. For he ought to bring a thing certain into judgment, lest it should happen that the judgment should be illusory or obscure, because a certain sentence cannot be passed upon a matter uncertain which is brought into judgment, although sometimes an action is brought concerning an uncertain thing. The judge or the justiciary (as far as is possible for him) ought to pronounce a certain judgment. But he will be able to specify thus, as if he should say, I claim against such a person so many manors, sometimes with the appurtenances, sometimes without them. Likewise so many knights' fees with the appurtenances. Likewise so many carucates of land, so many virgates, so many acres, so many ridges. Likewise so many pounds-worth of land, so many shillings-worths of land, so many bovates of land according to the diversity of tenements, and according to what is contained in writs of right and of entry, and that the declaration shall accord with the writ, from which if it is in disaccord and the declaration does not accord with the writ, the claimant loses, because a variation is not admitted. A variation however is some times admitted, provided however it states something similar, as if it be contained in the writ that he claims two carucates of land which are worth annually ten

5. It is incumbent, that the claimant should designate the thing, which he claims, with its appurtenances.

bratas, non ꝑpter hoc recedit à brevi suo si dicat, peto decem libratas terræ, quia dicit ꝙ tantundem valet, non enim refert utrum quid fiat vel suum simile.

f. 431 b.

Cap. XXVII.

1. Proposita intentione videre poterit tenens an totam teneat vel non, et, unde oportet quod visum habeat vel quod tantundem valeat.

Cum autem petens intentionē suam sic formaverit, æstimare debet tenens an teneat totam terram petitam vel ejus ꝑtem vel omnino nihil : si totam teneat, utrum illam teneat nomine ꝑprio vel nomine alieno. Si autē nomine alieno ut si in custodia, ad vadium, ad voluntatem, vel ad terminum annorum, cadit bre, quia actio non competit cōtra talē, sed contra illū cujus nomine fuerit in seysina. Si autē nomine ꝑprio, tunc refert utrū ad terminū vitæ, vel ut de feodo. Et quo casu concedatur ei visus, si visum petierit, ut petens ostendat ei quantū terræ petierit, et ꝑ quas metas, et hac ratione dabitur ei dilatio, ut, inde habito visu, sciri poterit si terram petitā integrè teneat vel non, ut supra in tractatu de visu faciendo. Et hæc vera sunt, nisi petens incontinenti ostendere possit certitudinē ꝑ quā facere possit ꝙ tantundem valeat, ut si dicat: peto tantam terram ꝑ tales metas, vel tantam terram unde antecessor suus obiit seysitus ut de feodo, vel sic: peto advocationē ecclesiæ S. Petri, cùm duæ fuerint ecclesiæ in eadem civitate, videlicet S. Petri & S. Pauli, ut supra plenius in tractatu de visu faciendo.

Supra, f. 179 b.

2. Cum visum habuerit, quid faciendum.

Cùm autem tenens visum habuerit vel quod tantundē valet, scire poterit utrum petenti respondere teneatur et ad breve suum vel non teneatur, secundū quod tenuerit totam rem nomine ꝑprio vel alieno, vel

pounds worth, he does not recede from his writ, if he says, I claim ten pounds worth of land, because he says what is equivalent, for it does not matter whether a thing or its like be done.

Chapter XXVII.

f. 431 b.

1. The declaration having been propounded, the tenant may see whether he holds the whole or not, and whereupon it is incumbent that he should have a view or what is equivalent.

But when the claimant has thus shaped his declaration, the tenant ought to estimate whether he holds all the land claimed, or a part of it, or none at all: if he holds the whole of the land, whether he holds it in his own name, or in another person's name. If indeed in another person's name, as if in guardianship, as a security, at will, or for a term of years, the writ abates, because an action does not lie against such a person, but against him in whose name he is in seysine. But if in his own name, then it matters whether he holds it for the term of his life, or as in fee. And in which case let a view be allowed to him, if he claims a view, that the claimant may point out to him how much land he claims, and by what boundaries, and on this account an adjournment will be granted to him, that, a view having been had thereof, it may be known whether he holds the land claimed in its entirety or not, as above in the treatise concerning the making of a view. And these things are true, unless the claimant can forthwith show a certainty through which he can make out what is equivalent, as if he should say, I claim so much land by such boundaries, or so much land whereof my ancestor died seised as of fee, or thus; I claim the advowson of the church of St. Peter, when there are two churches in the same city, to wit, the church of St. Peter, and the church of St. Paul, as above more fully in the treatise on making a view.

2. When he has had a view, what is to be done.

But when the tenant has had a view or what is equivalent, he will be able to know whether he is bound to make answer to the claimant and to his writ, or he is not so bound, according as he holds the entire thing in

nihil inde tenuerit, vel non nisi ejus partem: quia si totam non tenuerit, amittere non potest quod non habet, et ita cadit breve, sed non actio, nisi ita sit quòd petens ostendere possit quòd tenens totam teneat in dominico et in servitio, nisi tenens docere possit contrarium, quòd nec in dominico nec in servitio: & quo casu fieri possit jocus partitus, si partes consenserint sub tali periculo, vel quòd tenens rem petitam amittat, vel quòd petens clamorem suum imperpetuat, sed hoc erit voluntarium & non judiciale. Et notandum, quòd cùm tenens semel talem exceptionem ꝑposuerit, ulterius consimilem ꝑponere non possit, ne diutius ꝑtrahatur negotium, et tenens ad hoc poterit coarctari, quòd ostendat quid in possessione extiterit, ne iterum cadat breve ꝑ mendacium, et etiam ad omnes exceptiones quæ faciunt ad breve prosternendum.

3. Oportet designare quæ vel qualis sit, quam petit, res mobilis vel immobilis, et certa designatio.

In hac quidem actione ꝑ brẽ de recto, sicut in qualibet alia actione ꝑ quā petitur res corporalis, designare oportet petentē q̃ & qualis sit res quæ petitur, ut si sit res im̄obilis sicut tenementum, designare oportet qualitatem et quantitatem, ut supradictū est. Si autem res mobilis, sicut animal, vestis, vel aliud quod consistit in pondere, numero, vel mensura, quia non sufficit dicere, peto rem, nisi dicatur peto talem rem. Item si tenementum, oportet designare utrum sit terra vel redditus. Item si redditus, utrū sit annuus ꝓveniens ex tenemento, vel datus de camera, secūdū q supra distinguitur in tractatu de nova disseysina. Itē si res sit mobilis, oportet designare utrum petatur animal vel vestis, si animal, utrum leo vel homo: si

Supra, f. 180.

his own name or in another's name, or holds nothing thereof, or only a part thereof: because if he does not hold it all, he cannat lose what he has not, and so the writ abates, but not the action, unless it be that the claimant shall be able to show, that the tenant holds the whole in demesne and in service, unless the tenant can show the contrary, that he holds it neither in demesne nor in service: and in which case an alternative wager may be made, if the parties have consented under such a risk, either that the tenant shall lose the thing claimed, or that the claimant shall perpetuate his claim, but this will be voluntary and not judicial. And it is to be noted, that when the tenant has once propounded such an exception, he cannot propound a similar one afterwards, lest the affair be protracted too long, and the tenant may be constrained to this, that he should show what has been in possession, lest the writ should again abate through a lie, and likewise against all exceptions which tend to overthrow the writ.

3. It is incumbent to designate what and of what quality is the movable or immovable thing, which one claims, and a certain designation.

In this action indeed by a writ of right, as in any other action whereby a corporeal thing is claimed, it is incumbent that the claimant should designate what and of what quality is the thing which is claimed, as if it be an immovable thing as a tenement, it is incumbent that he should designate the quality and the quantity, as aforesaid. But if it be a movable thing as an animal, a vestment, or something else which consists in weight, number, or measure, because it is not sufficient to say I claim a thing, unless it be said, I claim such a thing. Likewise if it be a tenement it is incumbent to state whether it be land or a rent. Likewise if it be a rent, whether it be annual derived from the tenement, or granted from a chamber, according to what has been distinguished above in the treatise of novel disseysine. Likewise if the thing be movable, it is incumbent to designate whether an animal or a vestment is claimed, if an animal, whether it is a lion or a man; but if it be

autem vestis, utrū bombicina, vel lana, vel de linio.[1] Si autē petatur res q̃ in pondere consistat, sicut massa rudis vel formata, tunc scire oportet cujus sit ponderis et cujus generis. Si autem petatur res q̃ in numero consistat sicut pecunia numerata, tunc quot
f. 432. libræ, quot solidi, vel quot denarii. Si autem petatur res quæ consistit in mensura, tunc utrum liquidum aut solidum, ut si solidum, tunc cujus generis, utrum frumenti, hordei, vel alterius annonæ. Si autem liquidum, tunc utrum vinum, an oleum, vel hujusmodi, et sic cujus generis. De numero autem constare oportebit quot modia, vel quarteria, vel hujusmodi, & ita perpendi poterit de qualitate & quantitate rei mobilis. Si autem res fuerit immobilis sicut terra, eodem modo oportet designare qualitatem et quantitatem, ut supra dictum est. Item utrum tota petatur an ejus pars, et ne plus petatur à petente quàm tenens teneat. Item utrum petatur corpus rei cum pertinentiis, vel sine. Item utrum petatur unum corpus per se cum pertinentiis, vel plura corpora per se vel cum pertinentiis. Item si plura corpora cum pertinentiis vel sine, tunc utrum sese contingant et ita annexa sint quòd unum ab alio separari non possit, vel quòd sese in nullo contingant, et penitus sunt diversa. Item refert utrum petatur ab uno vel pluribus, et eodem modo utrum teneatur ab uno vel à pluribus, ut supra de participibus. Item designatur res quæ petitur ex nomine, ut si petam hominem, oportet designare nomen, quia nomina hominum cognoscendorum gratia imposita sunt. Eodem modo si petatur manerium, oportet quòd designetur ex nomine, vel si alia quævis res, vel alia

[1] "de lana aut de lino," MS. Rawl. C. 160.

a vestment, whether it be of silk, or of wool, or of linen. But if a thing be claimed which consists of weight, as a rude or a shaped mass, then it is incumbent to know of what weight and of what kind it be. But if a thing be claimed, which consists in number, as money counted out, then how many pounds, how many shillings, or how many pennies. But if a thing be claimed which consists in measure, then whether it be liquid or solid, as if solid, then of what kind, whether wheat, barley, or some other produce. But if liquid, then whether wine or oil or such like, and so of what kind. But as regards number, it will be incumbent to establish how many measures or quarters or such like, and so it may be ascertained concerning the quality and quantity of a movable thing. But if the thing be immovable as land, in the same manner it will be incumbent to designate the quality and the quantity, as above stated. Likewise whether the whole be claimed or a part of it, and that more be not claimed by the claimant than the tenant holds. Likewise whether the body of the thing is claimed with its appurtenances, or without them. Likewise whether one body by itself is claimed with its appurtenances, or several bodies by themselves or with their appurtenances. Likewise if several bodies with their appurtenances or without them, whether they touch one another and are so annexed that one cannot be separated from another, or that they do not in any way touch one another, and are entirely diverse. Likewise it is of importance whether it be claimed by one or several, and in the same manner whether it be held by one or several, as above concerning co-parceners. Likewise the thing which is claimed is designated by name, as if I claim a man, it is incumbent to designate him by name, because names are imposed for the purpose of distinguishing men. In the same manner if a manor be claimed, it is incumbent that it should be designated by name, or if any other thing, or anything which is equivalent, f. 432.

quæ tantundem valeat, ut supra de visu faciendo. Et quemadmodum petuntur corpora, sic et quandoquè petuntur jura, sicut jus advocationis quod est de pertinentiis alicujus rei corporalis, quia jura sine corporibus esse non possunt. Et petitur aliquando jus advocationis per se et cum suis pertinentiis, & aliquando cum corpore simul cum ipsa re, cùm sit de ipsius rei pertinentiis.

4. Exceptio, quod nihil tenet, et pœna quæ sequitur si inde convincatur.

Cùm autem dicat petens in intentione sua, peto versus talem tantam terram cum pertinentiis &c. excipere poterit tenens contra intentionem suam, quòd ipse nihil inde tenet, nec unquam aliquid inde tenuit: si petens hoc dedicere non possit, cadit breve simul cum actione, cùm tenens verum confiteatur. Si autem dicat se nihil tenere cùm revera totum teneat, & inde se posuerit in inquisitionem, si tenens per inquisitionem convincatur pro mendace, amittet rem quæ petitur propter mendacium. Et qualiter et per quod breve fieri debet inquisitio inferius dicetur: nec erit hic locus joco partito, nisi in hoc consenserint partes ex abundanti. Item si excipiat tenens hoc modo, & dicat quòd ipse nihil tenet sed alius, si in hoc mendacium inveniatur, amittet quod tenet propter mendacium et sine joco partito. Item si cognoscat quòd rem teneat sed non totam, quia alius partem, sive de ipso corpore sive de pertinentiis, si per inquisitionem de mendacio convincatur, non tamen propter hoc amittet ipsam rem totam, nec ejus partem, nec punietur mendacium ut prius, sed procedit loquela versus tenentem ut de toto respondeat, nisi aliud inducat ex communi assensu, ut jocus partitus. Et quod dicitur de corpore dicatur de pertinentiis, secundum quod totum tenuerit vel non

as above concerning making a view. And as bodies are claimed, so also sometimes rights are claimed, as the right of advowson, which is concerning the appurtenances of a corporeal thing, because rights cannot exist without bodies. And sometimes the right of advowson is claimed by itself and with its appurtenances, and sometimes with the body together with the thing itself, since it is of the appurtenances of the thing itself.

4. An exception, that he holds nothing, and the penalty which follows if he be convicted thereof.

But when the claimant says in his declaration, I claim against such a person so much land with its appurtenances, the tenant may except against his declaration that he holds nothing thereof, nor ever held anything thereof: if the claimant cannot gainsay this, the writ abates as well as the action, when the tenant confesses it to be true. But if he says that he holds nothing when in fact he holds the whole, and has put himself upon an inquest thereon, if the tenant be convicted by the inquest as a liar, he shall lose the thing which is claimed on account of the lie. And in what manner and by what writ an inquest ought to be made will be stated below: nor will there be here place for an alternative wager, unless the parties have over and above consented. Likewise if the tenant excepts in this manner, and says that he holds nothing, but another does, if a lie be found out in this, he shall lose it on account of the lie, and without an alternative wager. Likewise if he acknowledges that he holds the thing, but not the whole, because another holds a part, either of the body itself or of its appurtenances, if he be convicted of a lie by an inquest, he shall not on that account lose the entire thing itself, nor a part of it, nor shall the lie be punished as before, but the hearing of the case proceeds against the tenant that he shall answer concerning the whole, unless he induces something else by common assent, as an alternative wager. And what is said of the body may be said of its appurtenances, according as he may hold the whole or not hold it or a

tenuerit vel ejus partem. Item respondere poterit & cognoscere quòd aliquando tenuit rem petitam, sed modo non tenet illam, quo casu videndum erit quando desiit possidere. Desinere autem potest quis dolosè ne secum agatur, & quandoq̃ sine dolo, & unde videndum an desiit possidere ante brevis impetrationem vel post. Si autem ante, non tenetur ex dolo, cùm non sit in arbitrio suo quin debeat respondere, licet sit in arbitrio petentis quando velit agere. Item non tenetur ex dolo, licet post impetrationem alienaverit & transtulerit ad alium rem petitam, quia bene potest tenens ignorare impetrationem. Et petens poterit esse negligens in ꝑsecutione. Item alienare poterit sine dolo post impetrationem, et post summonitionem, ut si ante impetrationem vel post impetrationem (dum tamen summonitione præventus non sit) se transtulerit tenens ad partes transmarinas vel tam remotas, quôd de summonitione nihil sciverit & ibi alienaverit, non punitur. Si autem fecerit contrarium in casibus supradictis, haberi debet ꝑ possessore, & maximè si alienaverit post sum̄onitionem testatam & ꝓbatam: ut de termino S. Michaelis anno regis Henrici quarto incipiente quinto. Item si post impetrationem facta fuit alienatio pendente inquisitione, erit breve in pendenti et secundum hoc teneat vel cadat: ut de termino Sanctæ Trinitatis anno regis H. septimo in comitatu Oxoñ de Joceto de Plungenay. Si autem summonitione prævent⁹ fuit q̃ illam scivit vel scire debuit, ꝑ possessore habebitur, sive donatorius possessionem apprehenderit sive non. Item respondere poterit quòd

f. 432 b.

part of it. Likewise he may answer and may acknowledge that he some time ago held the thing claimed, but now he does not hold it, in which case it will have to be seen at what time he ceased to hold it. But a person f. 432 b.
may cease deceitfully that he may not be subject to an action, and sometimes without deceit, and hence it is to be seen, whether he has ceased to possess before the suing out of the writ or afterwards. But if before, he is not liable for deceit, since it is not at his choice whether he will answer or not, although it may be at the choice of the claimant, when he will proceed. Likewise he is not liable for deceit, although he may have alienated it after the writ was sued out, and has transferred to another the thing claimed, for the tenant may well be ignorant of the suing out of the writ. And the claimant may be negligent in the prosecution. Likewise he may without deceit alienate after the suing out of the writ and after the summons, as if before the suing out or after the suing out of the writ (provided, however, he has not been anticipated by the summons) the tenant has transferred himself to parts beyond the sea or so remote that he has heard nothing of the summons and has there alienated, he is not punished. But if he has done the contrary in the cases aforesaid, he ought to be regarded as the possessor, and especially if he has alienated after a summons attested and proved, as in St. Michael's term in the fourth and fifth years of king Henry. Likewise if after the suing out of the writ an alienation has been made pending an inquest, the writ will become pending and according to this may hold good or abate, as in Holy Trinity term in the seventh year of king Henry in the county of Oxford, concerning Jocetus de Plungenay. But if he has been anticipated by a summons, so that he knew of it or ought to have known of it, he shall be held to be the possessor, whether the donatory has taken possession or not. Likewise he may answer that he has not held the

totum corpus manerii non tenuerit, quia talis tenet tantum de corpore, unde ipse nihil habet, sive manerium petatur cum pertinentiis vel sine. Et unde nihil habet nec in dñico, nec in servitio, nec in eleemosyna, nec in advocationibus. Et unde oportet petentem p inquisitionem docere contrarium. Item vel tempore impetrationis vel summonitionis nihil tenuerit, dum tamen postea possidere inceperit, respondebit. Item cûm corpus manerii petatur in dominico, respondere poterit tenens, quòd nihil inde tenet in dominico sed totum in servitio, et quo casu, si ita sit, cadit breve et similiter actio, quia non potest tenens amittere id in dominico, quod non tenet nisi in servitio. Item cûm petens totum petat in dominico, tenens respondere potest et cognoscere q̃ totum non tenet in dominico, sed partim in dominico & partim in servitio, quo casu videtur quôd ex toto cadit breve, et actio tantum pro ea parte quam non tenet in dominico: nisi ita sit (secundum quosdam) quòd petens possit intentionem institutam in hoc mutare, quòd petere possit in dominico quod tenens tenet in dominico, et in servitio quod tenens tenet in servitio. In electione vero petentis est in hoc casu utrum velit quòd breve stet vel cadat, secundum quod se tenuerit ad petendum in dominico & servitio versus tenentem, et sic stat breve: vel quòd totum petat versus tenentem in dominico, et quòd sic cadat breve.

Fleta, vi. c. 50. § 12.

5. Exceptio, quod tenementum non teneat quia alius tenet de pertinentiis.

Item dicere poterit et respondere (ut supra) quòd nihil inde tenet omnino, nec in dominico, nec in servitio, nec in eleemosyna, nec in advocaria, & hoc p̃bato cadit bre. Item si dicat tenens q̃ totum non teneat, quia alius tenet de p̃tinentiis, vel de corpore manerii tantum, sicut advocationem vel tantam terram, repli-

whole body of the manor, because so-and-so holds so much of the body, whereof he has nothing, whether the manor be claimed with its appurtenances or without them. And whereof he has nothing neither in demesne, nor in service, nor in alms, nor in advowsons. And whereof it is incumbent that the claimant by an inquest should show the contrary. Likewise either at the time of suing out the writ or of the summons he held nothing, provided however he began to possess afterwards, he shall answer. Likewise when the body of a manor is claimed in demesne, the tenant may answer that he holds nothing of it in demesne, but the whole of it in service, and in which case, if it be so, the writ abates and likewise the action, because the tenant cannot lose that in demesne, which he only holds in service. Likewise when the claimant claims the whole in demesne, the tenant may reply and acknowledge that he does not hold the whole in demesne, but partly in demesne and partly in service, in which case it seems that the writ abates altogether, and the action only for that part which he does not hold in demesne, unless it be (according to some) that the claimant may change his instituted declaration in this matter, that he may claim in demesne what the tenant holds in demesne, and in service what the tenant holds in service. But it is at the election of the claimant in this case whether he wishes the writ to stand or fall, according as he has kept himself to the claim in demesne and in service against the tenant, and so the writ stands; or that he claims the whole against the tenant in demesne, and so the writ falls.

5. An exception that he does not hold the tenement, because another holds some

Likewise he may say and answer (as above) that he holds nothing thereof at all, neither in demesne nor in service, nor in alms, nor in advowsonry, and upon this being proved the writ falls. Likewise if the tenant says that he does not hold the whole, because another holds some of the appurtenances, or only the body of the manor, as the advowson or so much land, the claimant

f. 433. care poterit petens q̃ non habet necesse excipere p̃tem illā, vel quia omninò nō est de p̃tinentiis sed pertinet ad aliā t̃ram & ad aliud feodū, & semper p̃tinuit, & unde ipse idem nihil inde clamat, licet quandoq̃ esset de corpore vel pertinentiis, capitalis suus dn̄us qui eum inde feoffavit p̃tem illā alienavit anteq̃m antecessorem suū (cujus seysinā ipse petit) feoffaret, & ipse nihil aliud petit, nisi illud q̃ antecessor suus habuit anno & die quo feoffatus fuit, & post feoffamentū illud nihil de re petita alienatum fuit vel translatum.

6. Quod aliquando fuit de pertinentiis, sed postea desiit esse.

Item dicere poterit tenens quod, quando dominus rex dedit manerium illud cum pertinentiis tali abbati, qui eum inde feoffavit per chartā suam, non fuit terra illa de corpore manerii, nec de pertinentiis, quia prius data per ipsum regem, et idem abbas illam dedit antecessori suo per chartam suam in eodem statu, quo abbas illam tenuit de dono domini regis, & sicut charta regis testatur, scilicet in dominico, id quod abbas ante donum suum habuit in dominico, & in servitio quod habuit in servitio, eleemosyna, & in advocaria. Et unde dicere possit q̃ abbas à conquestu Angliæ de rege in regem, & semper se defendit per hoc quod dixit q̃ tenuit terram illam cum talibus pertinentiis in eleemosynam de regibus: ut de itinere Martini de Pateshul de loquela q̃ fuerit super judicium de diversis comitat̃ anno regis Henrici tertio in comitatu Kanc. de W. comite Marr̃ seniore & Falcasio de Breyāte. Ad hoc autem facit de termino Sanctæ Trinitatis anno regis Henrici quarto in comitatu Bedf. de W. comite Marr̃. Facit etiam ad hoc manifestè de termino Hilarii et Paschæ anno regni Henrici ut supra in principio, quia

may reply that he does not hold it necessary to except that part, either because it is not at all a part of the appurtenances, but it appertains to another land and to another fee and has always appertained to it, and whereof he himself claims nothing thereof, although at some time or other it may have been part of the body or of the appurtenances, his chief lord, who enfeoffed him with it, alienated that part before he enfeoffed his ancestor (whose seysine he himself claims), and he himself claims nothing else, except which his ancestor had in the year and on the day on which he was enfeoffed, and after that enfeoffment nothing of the thing claimed was alienated or transferred.

of the appurtenances. f. 433.

Likewise the tenant may say that, when the lord the king gave that manor with its appurtenances to such an abbot, who enfeoffed him with it by his charter, that land was not part of the body of the manor, nor of its appurtenances, because it had been previously given by the king himself, and the said abbot gave it to his ancestor by his charter in the same state, in which the abbot held it from the gift of the lord the king, and in like manner as the charter of the king testifies, to wit, in demesne that which the abbot before his own gift held in demesne, and in service that which he held in service, in alms and in advowsonry. And hence he may say that the abbot [held it] from the conquest of England from king to king, and he always defends himself hereby that he says that he has held that land with such appurtenances in alms from kings: as in the iter of Martin de Pateshull, in the argument which was upon a judgment concerning divers counties, in the third year of king Henry, in the county of Kent, concerning William Earl Marshall the elder and Fulk de Breauté. To the same effect is the judgment in Holy Trinity term in the fourth year of king Henry, in the county of Bedford, concerning William Earl Marshall. To the same effect also manifestly is a case in Hilary and Easter terms, in the year of king

6. That it was once on a time amongst the appurtenances, but it afterwards ceased to be so.

ibi dicitur, q̄ sicut manerium datū fuit antecessori in dominico & servitio &c. ita illam petit. Item si dicat tenens q̄ totam terram illam non teneat, quia cōmunis est, & partibilis inter cohæredes et participes, et si hoc negetur, inde fieri poterit inquisitio, utrū ita sit vel non sit, ut supra de p̄ticipibus. Et similiter de terr̄ S. M. añ regis Henrici decimosexto incipiente decimo septimo in fine. Item si petens plus petat q̄m tenens teneat, ut si petens petat viginti quatuor acras t̄ræ, cùm tenens nō teneat nisi viginti, aut stat b̄re aut cadit, & tūc fiat inquisitio p̄ tale b̄re.

7. Inquisitio utrum totum tenuerit, vel non.

Rex vic. salutē. Præcipim⁹ tibi q̄ assūptis tecū quatuor vel sex, vel pluribus legalibus hominibus ex illis, qui visū fecerunt de terra q̄m talis petit versus talē, & p̄ eos et alios legales homines diligēter inquiras, si p̄dictus talis tenens teneat xxiv. acras terræ integræ, quas talis clamat versus eundē talem necne, & unde idē talis tenens dixit q̄ nō tenuit inde nisi tantū viginti acras, & q̄ talis petēs inde tenuit quatuor acras, & inquisitionem illam nobis mittas &c. T. &c. Et de hac materia inveniri poterit de terr̄ S. H. añ regis H. quinto in com̄ Eborum de Petro de Malo Lacu. Itē si dicat tenēs excipiendo q̄ nihil teneat, cū aliàs in com̄ dixit se tenere totū, & cognovit, & à tali tenente, versus q̄m nunc petitur nisi ad terminū, et non alio modo, cùm petens hoc dedixerit fiat inquisitio p̄ hoc b̄re.

8. Si tenens dicat, quod

Rex vic. salutē. Precipimus tibi q̄ in pleno com̄ tuo recordari facias loquelā q̄ fuit in codē com̄ tuo, inter

Henry as above in the beginning, because it is there said that as a manor was granted to the ancestor in demesne and in service &c., so he claims it. Likewise if the tenant says that he does not hold all the land, because it is common and partible between co-heirs and co-parceners, and if this be denied, an inquest will have to be held thereon, whether it be so or not, as above concerning co-parceners. And in like manner in St. Michael's term in the sixteenth and seventeenth years of king Henry, at the end. Likewise if the claimant claims more than the tenant holds, as if the claimant claims twenty-four acres of land, when the tenant holds only twenty, the writ either stands or falls, and then let an inquest be held by a writ of this kind.

7. An inquest whether he holds the whole or not.

The king to the viscount greeting. We enjoin you that having associated with yourself four or six or more loyal men of those, who have made a view of the land which such a person claims against so-and-so, and by them and other loyal men you diligently inquire, if the aforesaid so-and-so the tenant holds twenty-four acres of entire land, which the said person claims against so-and-so, or not, and whereof the said so-and so the tenant says that he does not hold more than twenty acres, and that the said claimant held four acres thereof, and send that inquest to us, &c. Witness, &c. And on this matter a case can be found in St. Hilary's term in the fifth year of king Henry, in the county of York, concerning Petrus de Malo Lacu. Likewise if the tenant says in excepting that he holds nothing, when he has said elsewhere in the county that he holds it all, and has acknowledged it, and from such a tenant, against whom it is now claimed, only for a term, and in no other way, when the claimant has denied this let an inquest be made through a writ of this kind.

8. If the tenant says that he

The king to the viscount greeting. We enjoin you that in your full county court you cause to be recorded the cause which was heard in your said county court

nihil tenea f. 433 b. et alias cognovit quod totum teneat.

tales de tanta ῖra cum ꝑtinētiis &c. Et unde ꝑdictus talis versus quem &c. respondebit quòd non tenuit terram illam nisi ad terminum, & ad voluntatē talis, nec aliquod jus clamavit in eadem. Et recordum illud habeas &c. per quatuor &c. Teste &c. Idē dies datus fuit partibus. De hac materia inveniri poterit de termino S. Michaelis anno regis Henrici nono incipiente decimo in comitatu Bedford, de Richardo de Bavadum. Item notandum q̄ si quis terram petat cum pertinentiis ab aliquo, & petat in dominico quod in dominico, & in servitio quod in servitio, si tenens nihil tenuerit in dominico, cadit breve. Et eodem modo licet ille, qui tenet de tenente, tenere debeat de eo, si tamen tenens implacitatus nihil perceperit de servitio, cadit breve eodem modo ut supra: ut de termino S. Trinitatis anno regis Henrici quarto in comitaī Buck., assisa mortis de Hugone de Gurnay.

9. Si cognoverit quod totum non tenuerit in feodo, sed partem.

Si autem tenens ita respondeat, quòd totam non teneat in feodo, sed partem in feodo, et partem in custodia, non cadit bῖe ꝓro ea parte quam tenens tenet in dominico: ut de itinere Martini de Pateshull in comitatu Kanc. anno regis Henrici duodecimo, de Godefrido de Resiton.[1] Eodē modo si quis ꝑ unū bῖe plura petat maneria, vel terras, vel alia q̄ sese non contingunt, stare poterit bῖe pro una parte, & cadere ꝑ alia ꝑte: cùm placita sint omnino diversa.

10. Si quis manerium petat cum

Item si quis manerium petierit cum omnibus ꝑtinentiis, ad quod pertineat advocatio ecclesiæ, & nihilominus per aliud breve petat advocationem, una est

[1] "Resyntone," MS. Rawl. C. 160.

between such and such persons concerning so much land with its appurtenances, &c. And whereof the aforesaid so-and-so against whom, &c. will answer that he did not hold that land except for a term, and at the will of so-and-so, nor has he claimed any right in it. And have that record, &c. by four, &c. Witness &c. The same day was given to the parties. Upon this matter a case may be found in St. Michaelmas term, in the ninth and tenth years of king Henry, in the county of Bedford, concerning Richard de Bavadum. Likewise it is to be noted that if any one claims a land with its appurtenances from any one, and claims in demesne what is in demesne, and in service what is in service, if the tenant holds nothing in demesne, the writ falls. And in the same way although he who holds of the tenant, ought to hold of him, if the tenant nevertheless when impleaded has derived nothing from the servitude, the writ falls in the same manner as above; as in Holy Trinity term, in the fourth year of king Henry, in the county of Bucks, an assise of mortdancester concerning Hugo de Gurnay.

holds nothing, and at another time recognises that he holds the whole. f. 433 b.

But if the tenant answers thus, that he does not hold the whole in fee, but part in fee and part in guardianship, the writ does not fall in respect of that part which the tenant holds in demesne: as in the iter of Martin de Pateshull in the county of Kent, in the twelfth year of king Henry, concerning Godfrey de Resiton. In the same manner if a person claims several manors through one writ, or lands or other things which do not touch one another, the writ may stand for one part and fall for the other part, since the pleas are altogether different.

9. If he has acknowledged that he does not hold the whole in fee, but a part.

Likewise if a person claims a manor with all its appurtenances, to which appertains the advowson of a church, and nevertheless by another writ claims the advowson, it is one action, and the writ falls since it is

10. If any one claims a manor with all its appurtenan-

omnibus pertinentiis, ad quod pertineat advocatio.

actio, sed breve cadit, cùm sit superfluum, quia petens plus petit eo quôd bis petit idem, & est una petitio nugatoria & inutilis, cùm alia sufficiat per se. Et idem erit si per unum breve petat manerium cum pertinentiis, et postea in narratione sua dicat sic: peto tale manerium cum pertinentiis & cum advocatione ecclesiæ, non tamen cadit propter hoc actio nec breve, sed suspendatur adjectio illa quasi superflua, cûm sufficiat manerium cum pertinentiis petere.

11. eplicatio super hoc.

Item replicare poterit petens eo quòd tenens dicit, quòd totum non teneat quia alius tenet advocationem, replicari poterit quòd advocatio non pertinet ad terram petitam, sed ad aliam baroniam, & ad aliud feodum, & ideo q̃ non est necesse illam excipere, ut de placitis quæ sequuntur regem anñ regni Henrici decimo nono in comitatu Bedf., de Johanne de Traylie & Waltero de Godardville. Et sic amittere poterit quis multipliciter propter plus petitionem. Plus autem peti potest multis modis: re, causa, loco, tempore, ut si quis dicat vel petat plus quã tenens teneat, cadit breve, sed non cadit actio, ut videri poterit de muliere petente dotem, ut si plus petat quã ad ipsum p̃tineat nomine dotis, nō tamē cadit à causa, dum tamen p̃testata fuerit q̃ plus non petierit quam tertiam p̃tem unde vir suus obiit seysitus ut de feodo: ut de terr̃ P. anno regis H. septimo in com̃ Sussex, de Nicholaa quæ fuit uxor Thomæ de Casteneys.

12. Si dicat quod nihil tenuerit

Cùm autē tenens dicat (ut supradictū est) q̃ nihil teneat, cùm revera tenuerit mentiendo, & petens ante inquisitionem inde factam se ipsum decipiendo se de

superfluous, because a person claims too much, inasmuch he claims the same thing twice over, and one of the claims is nugatory and useless, since the other suffices by itself. And the same will result if by one writ he claims a manor with its appurtenances and afterwards in his declaration should say, I claim such a manor with its appurtenances and with the advowson of a church, neither the action nor the writ falls, but let that addition be suspended as superfluous, since it is sufficient to claim the manor with the appurtenances. ces to which an advowson pertains.

Likewise the claimant may reply upon that which the tenant says, that he does not hold the whole because another person holds the advowson, it may be replied that the advowson does not appertain to the land claimed, but to another barony, and to another fee, and accordingly it is not necessary to except it, as in the pleas which follow the king in the nineteenth year of the reign of Henry, in the county of Bedford, concerning John de Traylie and Walter de Godardville. And so a person may lose in manifold ways through a claim for too much. But too much may be claimed in many ways, in the thing, in the cause, in the place, in the time; as if a person should say or claim more than the tenant holds, the writ abates, while the action does not abate, as may be seen concerning the woman claiming dower, as if she claims more than belongs to her under the name of dower, she does not, however, fall from her cause, provided, however, that she has avowed that she does not claim more than the third part of that whereof her husband died seysed as of fee, as in Easter term in the seventh year of king Henry, in the county of Sussex, concerning Nicholaa who was the wife of Thomas de Casteneys. 11. A replication upon this.

But when the tenant says (as afore stated) that he holds nothing, when he in fact holds it, saying what is false, and the claimant before an inquest has been held thereupon deceiving himself has withdrawn from the 12. If the tenant says that he holds nothing,

mentiendo, sicut de priore de Weylocke et W. de Insula. f. 434.

brevi retraxerit, et agere inceperit versus alium, qui à tenēte falsò dicebatur esse tenens, & qui dixerit se non tenere, cùm re vera nihil teneat, & per hoc constiterit per inquisitionem, ille qui falsò negavit non amittet propter mendacium eo quòd petens de mendacio illum non convincit, sed minus cautè se retraxerit, & sic non punitur mendacium propter suam negligentiam, quod quidem fieret si negligens non fuisset.

13. Si tenens dicat quod totam terram non teneat, et petens quod totum, et sic fit res dubia per negationem, aut locus erit joco partito, aut inde inquisitio de pertinentiis, et sunt pertinentiæ pertinentiarum.

Cûm vero tenens excipiendo dicat quòd totam terram petitam non teneat, et petens dicat quôd totam teneat, quia per hoc si[1] res dubia, fiat inde inquisitio sub periculo amissionis per jocum partitum: ut de termino Sancti Hilarii anno regis Henrici nono, de Rogero de Drayton in comitatu Derby. Si autem objiciatur à petente, quòd terra quæ excipi deberet non sit de pertinētiis terræ petitæ, tunc fiat inquisitio per hæc verba, scilicet si tanta terra cum pertinentiis, quam talis tenet in tali villa, sit de tot hidis vel de tanta terra, vel de corpore talis manerii, vel de ejus pertinentiis, quam talis clamat versus talem, vel aliter: Si ille talis teneat tales hidas, vel tot hidas terræ, vel tantam terram in eisdem villis, sive terram illam quam idem talis clamat in prædictis villis versus talem. Et de hac materia inveniri poterit de termino Sancti Hilarii anno regis Henrici nono in comitatu Warr̃ de Roberto de Cherleton. De hoc autem quod dicitur (quôd talis petit tantam terram cum pertinentiis), dictum est supra de pertinentiis quæ et quales sunt. Sunt enim per-

[1] " fit," MS. Rawl. C. 160.

writ, and has begun an action against another person, who was stated falsely by the tenant to be the tenant, and who has stated that he was not the tenant, when in reality he held nothing, and this has been established by an inquest, he who has falsely denied [that he was tenant] shall not lose on account of his falsehood, inasmuch as the claimant does not convict him of falsehood, but has incautiously withdrawn himself [from the suit], and so the falsehood is not punished on account of his negligence, which would take place, if he had not been negligent.

saying what is false, as concerning the prior of Weylocke and W. de Insula. f. 434.

But when the tenant in excepting says that he does not hold all the land claimed, and the claimant says that he does hold the whole, because thereby it becomes a doubtful matter, let there be thereon an inquest under the risk of losing it through an alternative wager, as in St. Hilary's term in the ninth year of king Henry, concerning Roger de Drayton in the county of Derby. But if it be objected by the claimant, that the land which ought to be excepted is not amongst the appurtenances of the land claimed, then let there be an inquest through these words: to wit, if so much land with its appurtenances, which so-and-so holds in such a vill, be of so many hides, or of so much land, or of the body of such a manor, or of its appurtenances, which so-and-so claims against such person: or otherwise, if the said so-and-so holds such hides or so many hides of land, or so much land in the said vills, or that land which the said so-and-so claims in the aforesaid vills against such person. And on this matter a case will be found in St. Hilary's term in the ninth year of king Henry in the county of Warwick, concerning Robert de Cherleton. But concerning this which is said (that so-and-so claims so much land with its appurtenances), we have spoken above concerning appurtenances what they are and of what kind. For there are appurtenances and a body to which ap-

13. If the tenant says that he does not hold the whole land, and the claimant that he does hold the whole, and thus there is a dubious matter through the denial, there will be place for an alternative wager, or thereupon there will be an inquest concerning the appurtenances, and there are appurtenances of appurtenances.

tinentiæ, & corpus ad quod pertinent pertinentiæ, & sunt pertinentiæ pertinentiarum.

Cap. XXVIII.

1. De exceptione quam habetis ex errore in nominibus villarum. Item quid sit villa, quid mansio, quid manerium.

Item dicitur (etiam in tali villa) & si error sit in nominibus villarum satis dictum est supra quid inde faciendum sit, sed si minus ibi dictum sit, fiat hic repetitio ut addatur. Videndum igitur quid mansio, quid villa, et quid manerium. Mansio autē esse poterit cōstructa ex pluribus domibus, vel una q̃ erit habitatio una & sola sine vicino, etiā etsi alia māsio fuerit vicinata nō erit villa, quia villa est ex pluribus mansionib⁹ vicinata, & collata ex plurib⁹ vicinis. Maneriū autē fieri poterit ex plurib⁹ villis vel una, plures enim villæ possunt esse in corpore manerii sicut et una, & ad unam mansionē ptinere poterunt plura tenementa. Et genera tenementorū plurib⁹ & diversis nominib⁹ specificata, q̃ cùm ad mansionem ptineant non poterant dici q̨ sint in tali villa specificata, denominatione māsionis, sed māsio et teñta simul esse possunt in aliqua villa, ex plurib⁹ mansionib⁹ vicinata. Itē quandoq̃ est manerium in villa, & ubi non fuerit nisi unica villa in manerio denominari possunt uno nomine, & teñta tali manerio adjacentia erūt in tali villa & in tali manerio, quia villa denominatur à manerio, & maneriū à villa è cōtrario. Item & secundum hoc plura possunt esse in patria una & diversa maneria et diversæ et plures villæ: et ideo tenementa et agri limitata ad unum manerium vel unam villam non possunt dici quòd sunt in alio manerio sive alia villa, quia limitati sunt fines agro-

Fleta, vi. c. 51. § 1.

f. 434 b.

pertain the appurtenances, and there are appurtenances of appurtenances.

Chapter XXVIII.

Likewise it is said "also in such a vill," and if there be an error in the name of the vills, it has been sufficiently explained above what is thereupon to be done, but if too little has been there said, let there be here a repetition that it may be added. It is to be seen therefore what is a mansion, what a vill, and what a manor. A mansion then may be constructed of several houses, or may be one, which shall be a single and sole habitation without a neighbour; and although another mansion may be in the neighbourhood, it will not be a vill, because a vill is made up of several adjoining mansions and is composed of several neighbouring ones. But a manor may be made up of several vills or be one only, for several vills may be in the body of a manor equally as one, and several tenements may belong to one mansion. And the kinds of tenements are specified by several and diverse names, which when they belong to a mansion cannot be said to be specified in such a vill under the denomination of a mansion, but the mansion and the tenements may be together in a certain vill, made up of several adjoining tenements. Likewise sometimes there is a manor in a vill, and where there has been only a single vill in a manor, they may be described by one name, and the tenements will be adjoining to such a manor, in such a vill and in such a manor, because the vill is named from the manor, and the manor contrariwise from the vill. Likewise according to this there may be several and diverse manors in one county, and diverse and several vills, and accordingly tenements and lands limited within one manor and one vill cannot be said to be in another manor or in another vill, because the boundaries of fields are limited. Like-

1. Of the exception which you have upon an error in the name of the vills. Likewise what is a vill, what a mansion, what a manor.

f. 434 b.

rum. Item si plures sint villæ in uno manerio, poterit res petita esse in una villa vel in diversis, & si in diversis, specificari poterit quantum vel quid petatur in una vel in alia & tamē utraquè erit in uno manerio et corpore manerii, sed non è contrario, q quicquid sit in manerio sit in qualibet villa, quia villa non continet manerium nec comprehendit, sed è contrario manerium continet & cōprehendit omnes villas. Poterit etiam esse, cûm plures sint villæ in manerio, quòd totū manerium denominatur à nomine illius villæ, licet totu manerium cōprehendi nō possit sub villa, et unde aliud est dicere, in tali villa, aliud in tali manerio, quia specificato nomine manerii obscura erit petitio et nulla, nisi specificatū fuerit nomen villæ, in qua tenementum petitum fuerit, si alia fuerit villa et diversa ab ea de qua denominatur maneriū, cùm plures fuerint villę in eodem manerio. Si autem tenementum fuerit in villa de qua denominatur manerium, recte petitur si fiat respectus ad denominationem qua specificatur villa, et non qua specificatur maneriū, licet villa illa sit in eodem manerio, quia si haberetur respectus ad nomen secundum quod est nomen manerii, villæ esset specificatio, cùm plures aliæ villæ sint in eodem manerio. Item habito respectu ad nomina villarū, non quicquid est in una villa est in alia, licet quicquid sit in omnibus villis sit in uno et eodē manerio.

2. Exceptio ad hoc quod dicit jus meum, et quod diversa sunt jura.

Itē cōpetit exceptio tenenti ex hoc quòd petens in intentione sua dicit, peto versus talem tantā terram cū pertinentiis in tali villa ut jus meum. Ad quod notandum quòd diversa sunt jura, unum videlicet possessionis & aliud ꝓprietatis: possessionis, quoad liberum

wise if there be several vills in one manor, the thing claimed may be in one vill or in diverse, and if in diverse it can be specified how much and what is claimed in one or in the other, and nevertheless both will be in one manor and in the body of the manor, but not contrariwise, because whatever is in the manor is in one or other vill, because a vill does not contain nor comprise the manor, but on the contrary the manor contains and comprises all the vills. But it may well be, since there are several vills in the manor, that the entire manor is described by the name of one vill, although the entire manor cannot be comprised under the vill, and whence it is one thing to say in such a vill, and another thing to say in such a manor, because by specifying only the name of the manor the claim will be obscure and null, unless the name of the vill has been specified in which is the tenement claimed, if there be another vill different from that from which the manor has derived its name, when there are several vills in the same manor. But if the tenement is in the vill from which the manor has derived its name, it is rightly claimed if regard be had to the denomination by which the vill is specified, and not to that by which the manor is specified, although that vill should be in the same manor, because if respect should be had to the name according to what is the name of the manor, it would be a specification of the vill, when there are several other vills in the same manor. Likewise respect being had to the names of the vills, it does not follow that whatever is in one vill is in another, although whatever is in all the vills is in one and the same manor.

2. An exception upon this that he speaks of "my right," and that there are diverse rights.

Likewise an exception is available to a tenant out of this, that a claimant in his declaration says, I claim against such an one so much land with its appurtenances in such a vill as my right. Upon which it is to be remarked that there are diverse rights, one, to wit, of possession and another of property; of possession as

tenementum vel quoad feodum: quoad liberum tenementum, ut si quis quacunque ratione tenuerit ad vitam suam: quoad feodum, ut si quis tenuerit ad feodum sibi & hæredibus suis. Est etiam jus ꝑprietatis, quod dicitur jus merum. Et quandoque conjungitur in una persona jus possessionis & jus proprietatis, secundum quod dicitur: iste se ponit in assisam de *Dreyt dreyt*, et ad quemcumque pertineat jus proprietatis illum sequi debet possessio, quia possessio semper sequitur proprietatem et non è converso. Et quandoquè dividitur jus proprietatis à possessione, quia proprietas statim post mortem antecessoris descendit hæredi propinquiori, præsenti & absenti, scienti & ignoranti, minori sicut majori, masculo & fœminæ, furioso et mente capto, stulto et fatuo, surdo & muto naturaliter. Sed tamen non statim acquiritur talibus possessio, quia alius ante aditionem hæreditatis parens vel extraneus medio tempore se ponere possit in seysinam, et de seysina talis poterit jus possessionis descendere ad hæredes talium inferiores, per negligentiam proprietarii: ut si cùm jus proprietatis descendat ad antenatum propinquiorem, frater postnatus se ponat in seysinam, et sic cûm post longum intervallum quòd sine brevi ejici non potest moriatur seysitus, transmittit ad hæredes suos cum jure possessionis quod ipse
f. 435. habuit quasi in feodo quoddam jus proprietatis cum jure possessionis illius, q̃ sequi debeat primam ꝑprietatem, et sic de hærede in hæredem usq̃ in infinitū, et sic erunt ibi duo jura ꝑprietatis per diversum descensum et diversas personas et gradus. Sed unus eorum majus jus ꝑprietatis habebit ꝑpter prioritatem, sicut frater antenatus & ipsius hæredes, et illi minus jus qui descendunt de fratre postnato, sed semper

regards the free tenement and as regards the fee. As regards the free tenement, as if some one on any grounds holds land for the term of his own life. As regards the fee, as if a person holds it in fee for himself and his heirs. There is likewise a right of property which is termed mere right. And sometimes there is conjoined in one person the right of possession and the right of property, according to what is said, "This person puts himself upon an assise of Right right:" and to whomsoever appertains the right of property, possession ought to follow him, because possession always follows property, but not the converse. And sometimes the right of property is divided from possession, because the property forthwith after the death of an ancestor descends to the next heir, present and absent, knowing and ignorant, a minor just as a major, a male and a female, a madman and an insane person, a fool and a silly person, a person deaf and dumb from his birth. But nevertheless possession is not forthwith acquired by such persons, because another person, before an entrance into the inheritance, a relative or a stranger, may in the meantime put himself into seysine, and from the seysine of such a person a right of possession may descend to the lower heirs of such persons through the negligence of the proprietor; as if when the right of property descends to an earlier-born next of kin, a younger-born brother puts himself into seysine; and if after a long interval, so that he could not be ejected without a writ, he dies seysed of it, he transmits to his heirs with the right of possession, which he himself had as it were in fee, a certain right of property with the right of that possession, which ought to f. 435.
follow the first property, and so from heir to heir to infinity; and so there will be two rights of property by a different descent and different persons and degrees. But one of them will have a greater right of property on account of priority, as the elder-born brother and his heirs; and the others an inferior right who descend from

p̃ferri debet possessio, donec hæredes descendentes de fratre antenato jus ꝑprietatis evicerint, et si cùm frater postnatus plures habuerit filios, et postnatus se posuerit in seysinam et sic seysitus obierit, ut p̃dictum est, ita esse poterit ut p̃dictū est.

3. Ad quos descendit hæreditas, et quo jure, et plures possunt jus habere, et unus majus et alius minus.

Et sic de hærede ad hæredem quòd ad plures descendere possit jus ꝑprietatis per diversas ꝑsonas, gradus et lineas, q̃ plura possunt esse jura ꝑprietatis et plures possunt habere majus jus aliis, secundum q̃ fuerint priores vel posteriores. Et hoc locum habere poterit in ꝑsonis extraneorū, sicut in personis parentum, qualitercunq̃ se posuerint in seysinam. Poterit autem quis dicere in intentione sua q̃ jus habeat in re petita, cùm omnino nihil juris habeat, quod perpendi poterit per narrationem descensus. Item cùm aliquid juris habuerit sicut cohæres, sicut frater postnatus, & hujusmodi, alius majus jus habet, sicut frater antenatus vel hæredes ex eo ꝑvenientes. Item excipere poterit tenens, q̃ si petens jus habeat, tamen sunt alii cohæredes et ꝑticipes qui tantūdem juris habent, sine quibus ipse nihil petere poterit, ut supradictū est: vel, quia res cōmunis est cum aliis ꝑticipibus, licet non cohæredibus. Item excipere potest q̃ adjunctum habet, sicut uxor de cujus jure agitur, & sine qua petere non poterit, ex quo nulla est facta mentio in brevi de uxore. Item excipere potest quòd si petens jus habeat, ille qui tenens est majus jus habet, quod quidem expediri poterit per magnam assisam, si tenens voluerit.

4. Quod poterit impedire descensus

Item competere poterit tenenti exceptio, licet antecessor ita seysitus fuerit ut de feodo et in re sicut petens ꝑponit, ꝑpter impedimentum descensus, ut si

the younger brother; but the possession ought always to be preferred, until the heirs descending from the elder-born brother have established the right of property; and if, when the younger-born brother has several sons, and the younger-born has put himself into seysine, and has died so seysed, as aforesaid, it may be so as aforesaid.

3. To whom descends an inheritance, and by what right, and several persons may have right, and one more, and another less.

And so from heir to heir that the right may descend to several through different persons, degrees, and lines, so that there may be several rights of property, and several persons may have more right than others, according as they have been prior or posterior. And this may take place in the persons of strangers, as in the persons of relatives, in whatever manner they may have put themselves into seysine. But a person may say in his declaration that he has a right in the thing claimed, when he has no right at all, which may be ascertained through the declaration of the descent. Likewise when he may have some right as a co-heir, as a later-born brother, and such like, another person has a greater right, as an elder-born brother or the heirs descending from him. Likewise the tenant may except that, if the claimant has a right, nevertheless there are other co-heirs and coparceners who have as much right, without whom he can claim nothing, as aforesaid, or because the thing is in common with other coparceners, although not co-heirs. Likewise he may except that he has an adjoint, as a wife concerning whose right an action is brought, and without whom he cannot claim, since no mention has been made in the writ concerning the wife. Likewise he may except, that if the claimant has a right, he who is the tenant has a greater right, which may be settled through a great assise, if the tenant wishes it.

4. That the descent may be impeded through a

Likewise an exception is available to the tenant, although the ancestor may have been so seysed as of fee and in realty as the claimant propounds, on account of an impediment in the descent, as if some one of the

per feloniam commissam per aliquem antecessorum.

aliquis antecessorum feloniã fecerit de qua convictus fuerit, ut si suspensus fuerit propter feloniam, vel utlagatus ritè et secundũ legem terræ, ex causa justa vel sine. Item ex cognitione ꝑpria, si feloniam cognoverit quamcũq, & sic regnum abjuraverit. Item si aliquis antecessorum suorum jus suum remiserit tenenti vel alicui de quo ipse habet causam possidendi, et quietũ clamaverit, vel cognoverit & remiserit pro se et hæredibus suis per finem factum in curia dñi regis.

5. Competit exceptio tenenti ex ipsa editionis actione, si omnino non, vel obscure.

Competit etiam exceptio tenenti ex ipsa intentione & editione actionis, ut si, cùm proponere debet intentionem, audito brevi nihil ꝑponat vel nihil omnino dicat, tenens erit absolvendus, quia nihil dicenti non erit aliquid respondendũ. Itẽ si intentionem suam ꝑponat obscurè, vel minus plene, vel dubiè, non erit ei respondendum, quia non refert utrum quis omnino intentionem suam ꝑponat, vel obscurè, vel non plenè, vel dubiè. Item si cũ intentionem suam ꝑponat plenè, nec doceat quo jure petat, non erit audiendus, quia si tantum dicat, Peto talem rem ut jus meum, non sufficit nisi incõtinenti de jure doceat, ut si dicat, et unde talis antecessor &c. Itẽ si de jure doceat aut fundat intentionẽ suam, non valet, nisi incontinenti
f. 435 b. ꝑbationem habeat, sicut inferius dicetur; quia qui nihil ꝑbat cadit intẽtio ꝑpter defectum ꝑbationis, nec refert utrum omnino nihil ꝑbaverit vel minus sufficienter, secundum q̃ inferius dicetur de litis contestatione.

6. Exceptio ex variatione nar-

Itẽ datur exceptio tenenti ex variatione narrationis, dicendo modo unum, modo aliud primo cõtrarium vel diversum, et si intentionem suã mutaverit, nisi in casu

ancestors has committed a felony of which he has been convicted, as if he has been hanged on account of a felony, or outlawed duly and according to the law of the land, from a just cause or without it. Likewise from his own acknowledgment, if he has acknowledged a felony of any kind, and so has abjured the realm. Likewise if any of his ancestors has released his right to the tenant or to any one from whom he has a just cause of possessing, and has quitclaimed him, or has acknowledged and released for himself and his heirs through a fine made in the court of the king.

felony committed by one of the ancestors.

An exception is also available to a tenant upon the declaration itself and the edition of an action, as if, when he ought to propound his declaration, upon the writ having been read aloud he propounds nothing or states nothing at all, the tenant will have to be absolved, because to a person who states nothing an answer will not have to be made, because it does not matter whether a person altogether propounds his declaration, or obscurely, or not fully, or doubtfully. Likewise if when he propounds his declaration fully and does not show by what right he claims, he will not have to be listened to, because if he only says, I claim such a thing as my right, it is not sufficient unless he forthwith explains concerning his right, as if he says, and whereof such an ancestor, &c. Likewise if he explains concerning his right or supports his declaration, it does not avail unless he forthwith supplies a proof, as will be explained below. Because of him who proves nothing the declaration falls on account of default of proof, nor does it matter whether he has altogether proved nothing or proved insufficiently, according to what will be said below concerning the joining of the issue.

5. An exception is available to a tenant upon the edition itself of an action, if it be altogether null or obscure.

f. 435 b.

Likewise an exception is allowed to the tenant upon a variation in the declaration, in saying at one time one thing, at another time another thing contrary to or diverse from the first, and if he has changed his declara-

6. An exception upon a variation in the declaration

rationis, dicendo modo unum et modo aliud primo contrarium.

licito vel ꝑ narrationē suam à brevi suo recesserit, ita q narratio non sit cōsona brevi, vel q non dicat quod tātundē valeat. Item si cùm semel intentionē suā ꝑposuerit et postea cadat breve ꝑpter vitiū, & cùm ꝑ aliud breve postmodū agere inceperit intentionē suam quam ꝑ primū bre ꝑposuerit in toto mutaverit vel in parte. Et multò fortius si ꝑ fraudem se retraxerit ab uno ut intentionē suā mutare possit in alio, quāvis objici possit q res nova novā causā desiderat, sed quāvis mutetur bre, tamē mutari nō debet actio nec intentio pri^{o} ꝑposita, nec magis variari debet in uno quam in diversis ꝑpter pluralitatē breviū cùm ꝑposita fuerit sub eadem actione.

7. Item competit tenenti exceptio rei judicatæ.

Itē cōpetit tenenti exceptio rei judicatæ, ut si antecessor petentis vel aliquis hæredū suorū rem petitam amiserit ꝑ judiciū in causa ꝑprietatis, sicut ꝑ magnā assisā vel duellū, vel juratam aliqm in qm se posuerat; et talis exceptio ꝑemptoria est, quia ex toto pimit judiciū. Itē si ꝑ concordiam & finē q̄ similiter ꝑemptoria est, quia dicitur finalis cōcordia, & ideo finalis quia imponit finē litibus, ut si tenēs dicat q aliquādo fuit placitū in curia regis de eadē tra inter talē petētē & talē tenēt vel eor antecessores, & loquela ita deducta fuit vel ĩminata q tra remāsit tenēti vel ejus antecessori ꝑ magnam assisā vel ꝑ duellū, juratā, vel inquisitionē, vel ꝑ defaltā post duellū vadiatū, vel magnā assisam electā, ꝑ judiciū, ꝑ finē factū, & hujusmodi de clameo nō apposito, hæc omnia ꝑbari possunt ꝑ rotulos et recorda justitiarii.

tion, except in a permissible case, or has receded from his writ by his declaration, so that the declaration is not consonant to the writ, or that it does not state what is equivalent. Likewise if when he has once propounded his declaration, and afterwards the writ falls from faultiness, and when by another writ he has commenced another action, he has changed in its entirety or in part the declaration which he had propounded through the first writ. And much more if by fraud he has drawn back from the one that he might change his declaration in the other, although it may be objected that a new thing requires a new reason, but although the writ be changed, nevertheless neither the action nor the declaration previously propounded ought to be changed, nor ought to be varied in one more than in divers respects on account of a plurality of writs, when it has been propounded under the same action.

in saying at one time one thing, and at another time another thing contrary to the first.

Likewise there is available to a tenant an exception of a prior judgment, as if the ancestor of the claimant or some of his heirs has lost the thing claimed by a judgment in a cause of property, as by a great assise or by a duel, or by a jury upon which he has put himself, and such an exception is peremptory, for it altogether perempts a judgment. Likewise if by an accord and a fine, which is in a similar way peremptory, because it is called a final accord ; and for that reason final, because it puts an end to litigation ; as if the tenant should say that it was once pleaded in the court of the king concerning the same land between so-and-so the claimant and so-and-so the tenant, or their ancestors, and the hearing was so conducted and terminated that the land remained with the tenant or his ancestor by a great assise or by a duel, a jury, or an inquest, or by default after wager of battle, or the choice of a great assise, by a judgment, by the making of a fine, and such like concerning a claim not advanced, all these matters may be proved through the rolls and records of the justiciary.

74. Likewise there is available to a tenant an exception of a prior judgment.

Cap. XXIX.

1. Exceptio ex taciturnitate, quod clameum non apposuerit.

Competit etiam tenenti exceptio ex taciturnitate petentis vel alicujus antecessoris sui, ut si quis tacuerit cùm viderit de jure suo ligitare vel concordiam facere clameum suum non apposuerit per judicium, sicut si magna assisa adjudicata fuerit, vel duellum vadiatum, vel jurata arramiata, vel cyrographum factum in curia, ut de itinere W. de Ralegh in comitatu Lync. de W. de Berningehurst. Et videndum quis & qualiter opponi debet clameus, & quando, & ubi, & cui præjudicatur quod clameum non apposuerit, & cui non. Item quando quis excusatur quod clameum non apposuerit, & quando non. Quis? & sciendum quod quilibet cujus interfuerit, sicut ille qui jus habuerit in re de qua contentio fuerit per seipsum vel per alium. Qualiter? & sciendum quòd sic dicere possit simpliciter, Appono clameū meū. Vel sic, si duellum vadiatū fuerit dicere possit, q̄ non ponit jus suum in clameū petentis nec in defensum tenentis, sufficit quidem si ipse vel antecessor suus faciat quod tantundem valeat, ut si placitū moverit tenenti, et fecerit rem litigiosam, quia sicut plus est facto appellare q̄m verbo, ita plus est apponere clameū facto q̄m verbo. Et ad hoc facit de termino S. Trinitatis anno regni regis H. xv. in coñ Hunt̃ de quadam Guldeburga, cui objectū fuit q̄ clameum non apposuit, et ipsa respondit q̄ fecit q̄ tantundē valet, quia tempore finis facti implacitavit tenentem p̄ aliud br̃e. Item si ipse, cui apponitur quòd clameū non apposuit,[1] sufficit si antecessor clameum apposuerit. Et ad hoc facit de termino S. Trinitatis anno regis Henrici nono in comitatu Midd̃,

f. 436.

[1] "cui opponitur, quod clameum non opposuit," MS. Reg. 9, E. xv.

Chapter XXIX.

An exception is also available for the tenant on the ground of the taciturnity of the claimant or of some one of his ancestors, as if a person has been silent when he saw persons litigating about his right or making an accord, and has not entered his claim in court; as if a great assise has been adjudged or battle wagered or a jury instituted or a chirograph made in court; as in the iter of William de Ralegh in the county of Lincoln, concerning W. de Berningehurst. And we must see who and in what manner a claim ought to be opposed, and when and where, and who is prejudiced by not having entered a claim, and who not. Who? and it is to be known that any one whose interest was concerned, as he who had a right in a thing concerning which contention is made either through himself or through another. In what manner? And it is to be known that a person may say simply thus: I enter my claim. Or thus, if battle has been wagered, he may say, that he does not found his right on the claim of the demandant nor on the defence of the tenant, it suffices indeed if he himself or his ancestor does that which is equivalent, as if he has commenced a plea against the tenant and has made the thing litigious, because just as it is more to appeal by an act than by a word, so it is more to advance a claim by an act than by a word. This is supported by a case in Holy Trinity term in the fifteenth year of king Henry in the county of Huntingdon, concerning a certain Guldeburga, against whom it was objected that she had not entered a claim, and she answered that she had done what was equivalent, because at the time when a fine was made she had commenced a plea against the tenant by another writ. Likewise the person to whom it is objected that he had not entered a claim, it is sufficient if his ancestor entered a claim. And this is supported by a case in Holy Trinity term in the ninth year of king Henry in the county of Middlesex, concerning

1. An exception on the ground of taciturnity, that he has not advanced a claim.

f. 436.

de Henry de Haquebut, et ubi Henry amisit tenemenť, quia pater suus clameum nō apposuit, cujus interfuerit clameum apposuisse, & si clameum apposuisset, hoc prodesset Henrico: et ibi ita responsum fuit petenti, q̄ finis fact[2] fuit de terra quæ petebatur in curia Henrici avi regis dñi regis Henrici, anno regni sui xxx., inter Wilhelmum Deynis, avum Wilhelmi qui petiit, & Waleranum tenentem, patrem cujusdam Johannis participis sui; per quem finem terra illa remansit eidem Wallerano[1] et hæredibus suis, et inde p̄fert cyrographum &c. Et postea alius finis factus fuit de eadem terra inter Luciam matrē prædicti Johannis et ipsum Johannem, et inde p̄tulit cyrographum confectum anno quarto regis J. Et desicut Henř non apposuit clameum suum nec antecessores sui, ideo noluit idem Johannes ei respondere nisi curia consideraret. Ad quod respondit Henricus quòd primus finis et cyrographum non potuerunt ei nocere, quia tunc fuit ipse infra ætatem. Et de secundo fine dicit quòd non debuit ei nocere, quia fuit in servitio dñi regis ultra mare apud Windoñ. Ad quod Johannes respondit q̄ tempore primi cyrographi et secundi fuit pater ipsius Henř vivus & sanus et p̄sens in curia ubi fines facti fuerunt, et desicut ipse clamorem suū non apposuit, petiit judiciū si debuit ei respondere. Ad quòd Henř respondit quòd re vera postquàm pater suus qui cruce signatus p̄fectus fuit in Terram Sanctā, et inde reversus fuit quasi stultus, & amiserat memoriam, ita quòd nescivit terram regere, et se dimisit, de terra illa. Ad q̄ Johannes respondit & dixit q̄ sanus fuit et incolumis, et tempore interdicti se contulit religioni, & bona memoria diu vixit postea in habitu religionis, et quia

[1] "Walerino," MS. Reg. 9, E. xv.

Henry de Haquebut, and where Henry lost a tenement because his father did not enter a claim when it was his interest to have entered a claim, and if he had entered a claim, this would have profited Henry ; and there it was answered thus to the claimant, that a fine had been made of the land which was claimed in the court of king Henry the grandfather of our lord the king Henry in the thirtieth year of his reign, between William Deynis, the grandfather of William who claimed, and Waleran the tenant, the father of a certain John his coparcener, by which fine that land was released to the said Waleran and his heirs, and thereon he produces a chirograph, &c. And afterwards another fine was made of the said land between Lucy, the mother of the aforesaid John, and the said John, and thereupon he produces a chirograph made in the fourth year of king John. And since Henry did not enter his claim, nor his ancestors, for that reason the said John was unwilling to make answer to him, unless the court should so resolve. To which Henry made answer, that the first fine and the chirograph could not harm him, because he was then under age. And concerning the second fine he says that it ought not to harm him, because he was in the service of the king beyond the sea, at Windoñ. To which John answered that at the time of the first and of the second chirograph the father of the said Henry was alive and well and present in the court when the fines were made, and since he did not enter his claim, he petitions for judgment, if he ought to answer. To which Henry replied that in truth after his father, who had vowed a crusade, set out for the Holy Land, and returned therefrom as if he were foolish, and had lost his memory, so that he could not manage his land, and he had demised the said land. To which John rejoined and said that he was sound in mind and well, and at the time of the interdict entered into a religious order, and lived a long time afterwards with a good memory

Henr̃ non potuit hoc dedicere, Johannes inde quietus recessit. Item quando? & sciendum q̃ statim in ipso placito et factione cyrographi, vel ante judicium si p̃sens fuerit in curia, vel si in patria vel in regno infra quatuor maria, nec allegare poterit ignorantiam nisi justum intervenerit impedimentū, nec ulterius audiri debet (ut videtur), quia terminum habet ad minus unius mēsis (secundū cōmunem p̃visionē regni) infra quem venire potest coī̃odè post placitū motū ubicūq̃ fuerit in regno infra quatuor maria, quia quilibet implacitatus debet habere summonitionem xv. dierum ad minus, quæ rationabilis dici poterit summonitio, nec conceditur alicui cyrographū primo die litigii, sed habebit alium diem p̃ spatium xv. dierum
f. 436 b. ad minus ad capiendum cyrographū suum, ut infra totum illud tempus possit qui jus habuerit apponere clameum suum. Itē ubi? & sciendum est q̃ in curia dn̄i regis in ipso judicio vel ante judicium.

2. Cui præjudicatur de clameo non apposito.

Itē cui p̃judicatur? & sciendum q̃ ei, de cujus jure agitur, & hæredibus suis in infinitum ab eo descendentibus.[1]

3. Qualiter fuerit excusatus quis, qui clameum non apposuerit.

Excusatur autem ille qui clameum non apposuerit multis modis, ut si tempore, quo finis factus fuit & cyrographū, fuit petens infra ætatem, vel antecessor qui clameum apposuisse debuit. Et illud idem observari deberet de jure (ut videtur per simile), si tunc fuit furiosus, vel mente captus, & non sanæ mentis, quia in multis ad paria judicantur minor et furiosus, vel multum non differunt, quia ratione carent. Illud idem (ut videtur) observari deberet de jure & feodo

[1] "Illud idem ut videtur observari deberet de jure et feodis ecclesiæ si rector clameum non apposuerit, quod ecclesiæ non prejudicatur, cum fungatur vice minoris, non magis quam minori, si custos clameum non apposuerit," MS. Reg. 9, E. xv.

in the garb of a religious order; and because Henry could not deny this, John withdrew therefrom acquitted. Likewise when? and it is to be known that immediately in the plea itself and in the making of the chirograph, or before the judgment, if he was present in court, or if in the neighbourhood or in the realm within the four seas; and he could not allege ignorance, unless a just impediment intervened, and he ought not to be heard further (as it seems) because he had a term at least of one month (according to the common provision of the realm), within which he might have come conveniently after the plea had been commenced, wherever he might have been in the realm within the four seas, because every body who is impleaded ought to have a summons of fifteen days at least, which may be termed a reasonable summons, nor is a chirograph allowed to any person on the first day of the lawsuit, but he shall have another day with an interval of fifteen days at least to take his own chirograph, so that within all that time a person who may have a right to enter a claim may do so. Likewise where? and it is to be known in the court of the lord the king during the very judgment or before the judgment. f. 436 b.

2. Who is prejudiced from a claim not having been entered.

Likewise who is prejudiced? and it is to be known that he is prejudiced, whose right is in issue, and all his heirs to infinity who may be descended from him.

3. In what way he may be excused, who has not entered his claim.

But he who has not entered his claim is excused in many ways, as if at the time when the fine and chirograph were made, the claimant was under age, or the ancestor who ought to have entered a claim. And the same practice ought to be observed of right (as it seems through its likeness), if he was then mad or his mind was affected or his mind was unsound, for in many respects a minor and a madman are judged on a level, or do not much differ, because they are bereft of reason. The same thing (as it seems) ought to be observed con-

ecclesiæ, si rector clameum non apposuerit, q̃ ecclesiæ non p̃judicatur, cùm fungatur vice minoris, non magis q̃m minori, si custos clameum non apposuerit. Quod quidem dici possit de aliis sicut de ideotis, & naturaliter surdis & mutis, et consimilibus. Sed vidēdum utrū imperpetuū excusentur vel ad tempus, scilicet quò minor effectus fuerit plenæ ætatis, vel furiosus sanæ mētis, ut tunc q̃ in minori ætate vel in furore facere non potuerunt, postmodū facere teneantur, vel si tacuerint ex hoc p̃judiciū eis g̃neretur, quia dicunt quidam, q̃ nisi minor infra annum postquam effectus fuerit plenæ ætatis, clameum apposuerit, minor ætas eum non excusabit: Sed revera excusatur imperpetuum, quia tempore litigii, in ipso judicio, et ante judicium redditū pendente litigio, debet clameū apponi vel non apponi, quia post judicium, vel cyrographi liberationem, non valet, licet fuerit appositum.

4. Excusatur, si in prisona tunc fuit.

Excusatur autē quis q̃ clameum suum non apposuerit, si tempore litigii in prisona detentus fuit ita q̃ venire non possit, nec mittere, quia nulli vertitur in dubium, & ubi eadem ratio, et idem jus erit, ideo videtur q̃ excusari debeat quis si per vim majorem, vel q̃ fraudem, extra prisonam detentus fuerit, ita q̃ venire non possit nec mittere, dum tamen hoc per certa judicia p̃bari possit.

5. Item, si infirmitate detentus, vel ultra mare.

Item excusari poterit (ut videtur) per similem, tanquàm prisonam, si quis tempore litigii tali infirmitate detentus fuerit quòd venire non possit, nec mittere, quia non discernit factum. Item excusatur uxor quæ sub potestate viri supposita, quòd clameū non appo-

cerning a right or a fee of a church, if the rector has not entered a claim, that the church should not be prejudiced, since it occupies the place of a minor, no more than a minor should be prejudiced, if his guardian has not entered a claim, which indeed may be said of idiots and persons naturally deaf and dumb and similar persons. But it is to be seen whether they are to be excused in perpetuity or for a time, forsooth until the minor has come of full age, or the madman has become of sound mind, so that then what they could not do when minors or when mad, they may afterwards be bound to do, or if they have been silent prejudice may be created against them, because some persons say, that unless a minor within a year after he has come of full age has entered a claim, his minority will not excuse him. But in truth he is excused in perpetuity, because at the time of the lawsuit in the judgment, or before judgment was rendered pending the lawsuit, a claim ought to have been entered or not entered, because after the judgment or the delivery of a chirograph, it is of no validity although entered.

4. He is excused, if he was then in prison.

But a person is excused who has not entered his claim, if at the time of the lawsuit he was detained in a prison, so that he could not come nor send, because it is matter of doubt for no one, and where there is the same reason, there is also the same right, therefore it seems that a person ought to be excused if he has been detained out of prison by *vis major* or by fraud, so that he could not come nor send, provided however that this can be proved by certain proofs.

5. Likewise, if detained by illness or beyond the sea.

Likewise a person may be excused through a similar cause, as if it were a prison, as if a person at the time of the lawsuit was detained by such an illness, that he could not come, nor send, because he does not discern the act. Likewise a wife is excused who is under the power of her husband, if she has not entered a claim,

suerit, licet mittere possit: ut de termino Sanctæ Trinitatis anno regni regis Henrici quarto in comitatu Glocester de Roberto Cusin. Et sic videtur quòd omnis impotentia excusat, sicut infirmitas, vis major, & hujusmodi. Est enim bona ratio à similibus procedere ad similia. Excusatur etiam quis quòd clameum non apposuerit, ut si toto tempore litigii fuit ultra mare, quacunque occasione, ita quòd sit verisimile quòd de placito poterit ignorare, nec in aliquo prædictorum casuum habet quis necesse post judicium vel cyrographum liberatum clameum apponere.

6. Si finis contineat falsitatem sicut de warrantia chartæ, ubi ille qui dicit se fuisse in seysina nullam habuit seysinam tempore confectionis cirographi. f. 437.

Excusatur etiam quis quòd clameum non apposuerit, scilicet ubi finis ipso jure sit nullus, ut si factus fuit de tenemento quòd alius tenuit, ut si ipse qui debuit clameum apposuisse, vel antecessor suus, fuit in seysina de eadem re, quando finis factus fuit, & non ille vel antecessor suus qui finem allegat, vel si finis factus fuerit per dolum et fraudē vel alio modo in alterius præjudicium, quòd finis tenere non debeat. Et de hac materia inveniri poterit de termino Sancti Michaelis anno regis Henr̃ iii. incipiente 4. in comitatu Sussex, assisa mortis antecessoris si Matilda amita Rogeri de Batlegh. Item excusatur quis quòd clameum non apposuerit ubi cyrographum nullum, ut si quis post disseysinam factam alium feoffaverit, quia finis revocari poterit & adnihilari.

7. Si tempore placiti nec ipse nec antecessor suus jus habuit.

Excusatur etiam quis si tempore litigii nec ipse nec antecessores sui aliquid juris clamare potuit in tenemento de quo agitur. Item excusatur quis de hoc quòd antecessor clameum non apposuit, cùm hoc fuerit objectum, eo quòd ille qui antecessor dicitur non fuit

although she could send, as in Holy Trinity term in the fourth year of the reign of king Henry, in the county of Gloucester, concerning Robert Cusin. And thus it seems that every want of power excuses, such as illness, *vis major*, and such like. For there is good reason to proceed from like to like. A person is also excused for not having entered a claim, as if, for instance, during the whole time of the litigation he was beyond the sea, on whatever occasion, so that it is likely that he might be ignorant of the suit, nor in any of the above cases is it necessary for a person to enter a claim immediately after judgment or the delivery of a chirograph. A person is also excused for not having entered a claim, to wit, where the fine is of right null, as if it has been made concerning a tenement which another person held, as if the very person who ought to have entered a claim, or his ancestor, has been in seysine of the same thing when the fine was made, and not he nor his ancestor who alleges the fine, or if the fine has been made f. 437. through deceit or fraud or in some other manner to another person's prejudice, so that the fine ought not to bind. And concerning this matter a case may be found in St. Michael's term in the third and fourth years of king Henry, in the county of Sussex, an assise of mort-dancester, if Matilda the aunt of Roger de Barlegh. Likewise a person is excused that he has not entered a claim, where the chirograph is null, as if a person after a disseysine has been made has enfeoffed another person, because a fine may be revoked and nullified.

7. If at the time of the plea neither he himself, nor his ancestor had any right.

A person is also excused, if at the time of the litigation neither himself nor his ancestors could claim any right in the tenement, concerning which the action is. Likewise a person is excused of this that his ancestor did not enter a claim, when this objection has been taken, inasmuch as he who is called the ancestor was not the ancestor of the person who now claims, so that

antecessor ejus qui nunc petit, quòd aliquid juris ei descendere posset per prædictum antecessorem.

8. Si finis factus fuit in occulto ante tempus legitimum, vel si non tenuerit nisi ad vitam.

Excusatur etiam quis qui clameum non apposuerit, si ante legitimum tempus unius mensis ad minus factum fuit cyrographum & deliberatum per fraudem. Et licet prima facie in pluribus casibus revocari possit finis & cyrographum ratione personarum quę tenementa non tenent nisi ad vitam, ut mulieres quæ tenent nomine dotis et hujusmodi, vel ratione personarum quæ villani sunt, & finem faciunt, & cyrographum de villenagio dominorum, præjudicatur eis si præsentes fuerint, & excusari non possunt cûm clameum non apposuerint. Et de hac materia inveniri poterit de termino Sanctæ Trinitatis anno regis Henr̃ xiv. in comitatu Norff. de Richard Angod. Excusatur etiam quandoque quis quòd clameum non apposuerit per servitiũ dñi regis, cùm nulli debeat esse damnosum, dum tamen in tali servitio sit quòd venire non possit nec mittere, ut si in regno obsessus fuit in castro vel aliter impeditus.

9. Item excusatur quis, si loquatur de seysina sua propria.

Item excusatur quis qui clameum non apposuerit, si loquatur de seysina sua ꝑpria ante finem factum post disseysinam, & impetraverit ante finem per breve suum, quia sic effecta est res litigiosa.

Cap. XXX.

1. In quibus casibus non excusatur.

Et notandum quod non excusatur quis de clameo non apposito, si fuerit in regno infra iv. maria, & venire possit vel mittere si voluerit. Et quòd non excusatur si mittere possit, inveniri poterit in rotulo de termino Sancti Hilarii anno regis Henrici vii. in

any right could descend to him through the aforesaid ancestor.

A person is also excused who has not entered a claim, if a chirograph was made and delivered for the purpose of fraud before the lawful time of one month at least. And although at first sight in most cases a fine and chirograph may be revoked by reason of persons who only held the tenement for life, as, for example, women who hold in the name of dower and such like, or by reason of persons who are villeins, and make a fine and a chirograph concerning the villenage of their lords; it is prejudicial to them if they have been present, and they cannot be excused when they have not entered a claim. And on this matter a case will be found in Holy Trinity term in the fourteenth year of king Henry, in the county of Norfolk, concerning Richard Angod. A person is also sometimes excused for not having entered a claim through the service of the king, since it ought not to be hurtful to anybody, provided he was in such a service that he could neither come nor send, as if he had been besieged within the kingdom in a castle or otherwise hindered.

8. If a fine was made in secret before the lawful time, or if he held only for life.

Likewise a person is excused who shall not have entered a claim, if he speaks of his own proper seysine before the fine was made after the disseysine, and he has sued out a writ for himself before the fine, because the estate has thus been made litigious.

9. Likewise a person is excused, if he speaks of his own seysine.

Chapter XXX.

And it is to be noted that a person is not excused for not having entered a claim, if he has been in the realm within the four seas, and could come or send if he wished. And that he is not excused if he could come, may be found in the roll of the term of St. Hilary in the seventh year of king Henry, in the county of Lin-

1. In what cases he is not excused.

f. 437 b. comitatu Lincol., de W. de Fountygne. Item non excusatur licet fuerit in languore, quia mittere potest, ut in eodem rotulo in comitatu Lync. de Simone de Hale, languor eum non excusavit, quia potuit misisse hominem suum ad clamorem apponendum.

2. Si quis dixerit se esse impeditum, hoc probare, debet, ut si dixerit se fuisse in partibus transmarinis vel in prisona et hujusmodi.

Qui vero impedimentum allegaverit, non sufficit dicere se esse impeditum, nisi hoc probet per sectam vel per patriam, ut si quis replicando dixerit se esse in partibus transmarinis, hoc probare debet: ut de termino Sanctæ Trinitatis anno regis Henrici iv. in comitatu Middlesex, assisa mortis antecessoris, si Robertus Cocus.

3. De exceptione finis facti.

Item competit tenenti exceptio finis facti contra petentem. Dicere enim poterit tenens, quòd aliquando finis factus fuerit in curis regis de eadem terra inter ipsum & petentem vel eorum antecessores, ita quòd per finem illum recognovit idem petens vel aliquis antecessorum suorum terram illam esse jus ipsius tenentis vel alicujus antecessoris sui, & illam remisit et quietum clamavit, &c. Et ad hoc probandum statim proferat cyrographum & finem, ad quod statim respondeat petens, statim replicando, et ostendat rationem quare finis ei nocere non debeat, vel quòd finis ille in nullo tangit personam suam, vel quòd ei nocere non debeat, vel tenenti valere, supradictis rationibus, & pluribus aliis inferius dicendis.

4. Exceptio de defectu probationis

Excipere etiam poterit tenens contra petentem quòd licet jus ei descenderit, sicut petens dicit, tamen non valet petitio sua nec actio pro defectu probationis

coln, concerning W. de Fountygne. Likewise he is not excused, although he may have had a lingering illness, because he could send, as in the same roll in the county of Lincoln, concerning Simon de Hale, a lingering illness did not excuse him, because he might have sent his man to enter a claim. f. 437 b.

2. If a person should have said that he was hindered, he ought to prove it, as if he has said that he was in parts beyond the sea, or in prison, or such like.

But for him who has alleged a hindrance, it is not sufficient to say that he has been hindered, unless he proves it by a sect or by the country, as if a person in replying should say that he has been in parts beyond the sea, he ought to prove this, as in Holy Trinity term in the fourth year of king Henry, in the county of Middlesex, an assise of mortdancester, if Robert Cocus.

3. Of an exception of a fine having been made.

Likewise an exception of a fine having been made is available to a tenant against a claimant. For the tenant may say, that a fine was at some time made in the court of the king concerning the same land between himself and the claimant or their ancestors, so that by that fine the said claimant or some of his ancestors acknowledged that land to be the right of the said tenant or of some ancestor of his, and released it, and quit claimed, &c. And to prove this let him forthwith produce a chirograph and a fine, to which let the claimant forthwith answer by immediately replying, and let him show a reason why the fine should not harm him, either because that fine in no respect touches his person, or because it ought not to harm him or to avail the tenant for the aforesaid reasons, and for many others to be stated below.

4. An exception from defect of proof

A tenant may also except against a claimant, that although the right should have descended to him, as the claimant says, nevertheless neither his petition nor his action avails by reason of a defect of proof on account

per lapsum temporis, quod tam longinquo tempore quod excedat memorias hominum, vel propter immutationem.

propter lapsum temporis, quia non est qui de seysina antecessoris petentis loqui possit, vel aliquid probare de visu suo proprio, vel patris sui qui hoc ei injunxit, quia seysina de qua petens loquitur omnem excedit probationem, sicut de tempore Henrici regis senis & ulterius, & hujusmodi exceptio substantiam capit ex tempore. Et hic est casus quòd ille qui jus habet amittit imperpetuum & hæredes sui, & ille qui nihil juris habet & hæredes sui imperpetuum retinebunt, & hoc est pro defectu probationis.

5. Exceptio, si tenens fuerit a duobus implacitatus, quia nemo de duabus rebus simul respondere potest.

Item competit tenenti exceptio dilatoria tantum. Ut si tenens de eadem re à duobus implacitatus fuerit, quia de una re non potest quis nec debet duobus simul & semel respondere. Et ideo refert utrum institutæ sunt actiones utræque super jure proprietatis, vel super ipsa possessione. Item quis prius, quis posterius impetravit, & ad quem & ad cujus jurisdictionem, ut per hoc sciri possit quis alteri præferri debeat & quis non.

6. Exceptio contra petentem jus merum per breve de recto, ut si ipse tenens teneat ad vitam quacunque ratione.

Item (ut supradictum est) poterit exceptio esse peremptoria contra petentem, quantum ad ipsum & hæredes suos, & perpetua, ut si quis rem petat ut jus suum & in feodo, & tenens dicat se jus habere ut in feodo sibi & hæredibus suis imperpetuum. Eodem modo concedere potest tenens quod petens jus habeat & feodum, tamen excipere potest tenens quòd habet liberum tenementum, ut quacunque ratione teneat ad vitam sicut nomine dotis, vel ex causa donationis per legem Angliæ & hujusmodi.

7. De tenente per legem Angliæ.

Ut si quis cum hæreditatem habuerit vel non habuerit uxorem duxerit habentem hæreditatem vel maritagium, vel aliquam terram ex causa donationis, si liberos inter se habuerint ex justis nuptiis procreatos

of lapse of time, because there is not a person who can speak of the seysine of the ancestor of the claimant, or can prove anything from his own proper sight, or that of his father, who enjoined him to speak of it, because the seysine, concerning which the claimant speaks, exceeds every proof, as in the time of Henry the old king and further, and an exception of this kind takes its substance from the time. And this is a case that he who has the right and his heirs lose it for ever, and that he who has no right and his heirs will retain it for ever, and this arises from defect of proof.

through lapse of time, that it is at so distant a time that it exceeds the memories of men, or on account of a change.

Likewise an exception only dilatory is available for a claimant. As if a tenant has been impleaded by two persons concerning the same thing, because a person neither can nor ought to answer to two persons together and at one time. And therefore it is material whether both the actions have been instituted upon the right of property or the fact of possession. Likewise who first and who latest sued out a writ, and to whom and to whose jurisdiction, that thereby it may be known who ought to be preferred to the other, and who not.

5. An exception, if a tenant has been impleaded by two parties, because no person can answer concerning two things at the same time.

Likewise (as has been said above) an exception may be peremptory against a claimant, as far as regards himself and his heirs, and perpetual, as if a person claims a thing as his right and in fee, and the tenant says that he has the right in the fee for himself and his heirs in perpetuity. In the same manner the tenant may concede that the claimant has the right and the fee, nevertheless the tenant may except that he has the free tenement, that on any grounds he may hold it for his life, for instance, in the name of dower, or by reason of donation according to the law of England, and such like.

6. An exception against a person who claims the mere right by a writ of right, as if the tenant himself holds for life in whatever manner.

As if a person, when he has or has not an inheritance, has married a wife who has an inheritance or a marriage-portion, or some land by reason of donation, if they shall have children procreated by themselves from a lawful

7. Concerning a tenant under the law of England.

Britton, ii. ch. xii. § 3. Fleta, l. vi. ch. 55. f. 438.

si uxor præmoriatur, remanebit viro hæreditas, & terra sua tota vita ipsius viri, sive superstites fuerint liberi sive mortui, omnes, vel quidam : dum tamen semel aut vocem aut clamorem dimiserint quod audiatur inter quatuor parietes, si hoc probetur. Et quod dicitur de primo viro dici poterit de secundo, si postmodum nupserit secundo viro, sive de primo viro hæredes habuerit apparentes sive non, plenæ ætatis vel minoris ætatis, quod quidem injuriosum est secundum Stephanum de Segrave, maximè cum de primo viro hærede habuerit, quod quidem sustinere possit, si nullos habuerit, dicebat enim quòd lex illa malè intellecta fuit, & malè usittata, quia quod dicitur de lege Anglię, intelligi debet de primo viro et eorum hæredibus communibus, et non de secundo, maximè cùm hæredes apparentes extiterint de primo.[1] Cùm igitur ille qui sic tenuerit implacitatus fuerit ab aliquo, & exceperit quòd tenet per legem Angliæ ad vitam suam ratione pueri qui auditus fuit clamare inter quatuor parietes, et responsum fuit ex adverso quòd nullus talis procreatus fuit nec vocem emisit, oportet tenentem probare contrarium per sectam sufficientem, quę audivit clamorem in propria persona, & non ex relatione aliorū vel auditu, qui omnes bene examinentur tam de die quàm de loco quàm de hora & de aliis circunstantiis, vel quod tantundem valeat, quòd vocem emiserit & baptizatus fuerit et Christianus effectus, ut de itinere M. de P. in coñ Leic. anno regis H. x., de Wilhelmo filio Walteri, de Lync. de terra de Grimesby.

8. Quid retinere possit, si tenuerit

Habebit etiam p legem Angliæ quicquid accidere potest, videlicet in servitio & hujusmodi, et in custodiis & in releviis tota vita sua. Si autem terra vel hære-

[1] Lex tamen ista ad secundos viros nullo modo extenditur, eo quod palam inhibetur per statutum. Fleta, l. vi., ch. 55. The statute to which Fleta refers, is the statute 13 Edw. I. De Donis.

marriage, if the wife should predecease her husband, the inheritance will remain for him and her land during the entire life of the husband, whether the children have survived or have died, all or some, provided however that they have once uttered either a call or a cry which might be heard within four walls, if this can be proved. And what is said of the first husband may be said of the second, if she has afterwards married a second husband, whether she has had by her first husband heirs apparent or not, of full age or in their minority, which is unjust according to Stephen de Segrave, especially when she has had heirs by her first husband, which he could support if she should have had none, for he said that that law was ill understood and ill practised, because what is said concerning the law of England, ought to be understood of the first husband and his common heirs, and not of the second, especially when there were heirs apparent by the first husband. When therefore he who thus held has been impleaded by any one, and has excepted that he holds by the law of England for his life by reason of a son, who was heard to cry within four walls, and it was answered on the adverse side that no such son was procreated nor uttered a cry, it is incumbent that the tenant should prove the contrary by a sufficient sect who heard the cry in their own persons and not from the relation or narrative of others, who should be all well examined as well concerning the day as concerning the place and concerning the hour and other circumstances, or what is equivalent, that he uttered a cry and was baptized and was made a Christian, as in the iter of Martin de Pateshull in the county of Leicester in the tenth year of king Henry, concerning William the son of Walter of Lincoln, respecting a land at Grimsby. f. 438.

8. What he may retain, if he shall

For he shall have by the law of England whatever may fall in, forsooth in service or such like, and in wardships and in reliefs for his entire life. But if the

per legem Angliæ. Britton, ii. ch. xx. Fleta, l. vi. ch. 55.

ditas acciderit post mortem uxoris, hoc ꝑtinebit ad hæredes si fuerint plenæ ætatis, & ad capitales dominos custodes si infra ætatem extiterint, & similiter custodia, quia nihil amplius retinere potest ꝑ legem istam nisi id quòd in vita uxoris accedit: ut de itinere W. de Ralegh in coñ̃ Beđ in fine rotuli. S. de Segrave de consuetudine illa & lege malè intellecta & usitata.[1] Et ideo necesse est probare quòd talis vocē emiserit, quia bene potest esse q̃ vocē emiserit, & ꝑbatio deficere poterit, & bene poterit esse q̃ nunqm vocē emiserit, quia in utero mortu^{9}, ita q̃ nunqm ꝑcessit ad lucē, vel in ipso ꝑtu mortuus, ita q̃ vocem nunqm emiserit. Et ideo licet dicatur q̃ baptizatus fuit & sepultus ut Christianus, tamē nisi vocem emiserit & hoc ꝑbetur, non valet. Et licet ꝑtus moriatur in ipso ꝑtu, vel vivus nascatur vel fortè semimortu^{9}, licet vocē non emiserit, solent obstetrices in fraudem veri hæredes protestari ꝑtum vivum nasci & legitimum, & ideo necesse est vocē ꝑbare, & licet naturaliter mutus nascatur et surd^{9}, tamē clamorem emittere debet sive masculus sit sive fœmina: nam dicunt E. vel A. quotquot nascuntur ab Eva. Non sufficit igitur tantum baptizatus & sepultura.

9. De partu supposito.

Sed quid dicetur si uxor revera partum non peperit, sed supponatur partus qui clamorem emiserit, hoc ꝑbato cadat exceptio.

10. De forma et monstro.

Item si cûm partum ediderit, tamen partus declinaverit ad monstrum, & cùm clamorem emittere deberet emittit rugitum, & tunc videtur quòd tenere non debet

[1] The paragraph "S. de Segrave" down to "usitata" has the appearance of a side-note, which has found its way into the text. It has no place in MS. Reg. 9. E. xv., nor in MS. Rawl. C. 160.

land or the inheritance has fallen in after the death of the wife, this will appertain to the heirs, if they shall be of full age, and to the chief lords as guardians, if they are under age, and in like manner the wardship, for he can retain no more through that law except that which accrued in the lifetime of the wife, as in the iter of William de Ralegh in the county of Bedford, at the end of the roll. Stephen de Segrave concerning that custom and law ill understood and ill practised. And it is for this reason necessary to prove that the said boy uttered a cry; for it may well be that he uttered a cry, and the proof may be wanting; and it may well be that he never uttered a cry, because he died in the womb, so that he never came forth into the light, or he died in the act of birth, so that he never uttered a cry. And therefore although it may be said that he was baptized and buried as a Christian, nevertheless unless he uttered a cry and this is proved, it is of no avail. And although the offspring should die in the very birth, or be born alive or perhaps half-dead, although he has not uttered a cry the midwives are accustomed in fraud of the true heir to protest that the offspring was born alive and legitimate, and therefore it is necessary to prove a cry, and although he may be born naturally dumb and deaf, nevertheless he ought to utter a cry, whether he be a male or a female. For they cry E or A as many as are sprung from Eva. It is not sufficient therefore alone that he has been baptized and buried. hold by the law of England.

But what shall be said if the wife in truth has not brought forth a child, but a child has been substituted who has uttered a cry, upon this being proved the exception falls. 9. Of a suppositious offspring.

Likewise if when she has brought forth an offspring, nevertheless the offspring turns out to be a monster, and when it ought to utter a cry, it utters a roar, and thus it seems that the exception ought not to hold good, 10. Concerning a deformity and a monster.

exceptio, quia partus monstruosus est cùm non nascatur
f. 438 b. ut homo. Sed non dico partum monstruosum, licet natura membra minuerit vel ampliaverit: minuerit, ut in defectu digitorū vel hujusmodi; ampliaverit, ut si plures digitos vel articulos, sicut sex vel plures, ubi non debet habere nisi qūinq̃; si inutilia natura reddididerit mēbra, ut si curvus fuerit, vel gibbosus, vel
Britton, iii. ch. ii. § 19. membra tortuosa habuerit. Et notandum q̣ exceptio ista locum habet tam in causa possessionis, sicut in assisa mortis antecessoris & novæ disseysinæ, quàm in causa p̣prietatis per bṽe de ingressu vel per breve de recto. Et replicari poterit contra exceptionem p̃missam quòd omnino nullus p̣tus editus fuerit, nec clamor auditus, licet partus editus, quia mortuus fuit in utero vel in ipso partu. Item q̣ nullus editus fuit sed suppositus, licet clamor sit auditus. Item si editus, non tamē fuit formatus ut homo, sed ut monstrum. Item si editus, tamen convictus ad bastardum quacunque ratione quòd hæres esse non potuit propinquus vel remotus aliqua ratione.

11. Si inutilia natura reddidit membra, vel si curvus fuerit, vel gibbosus, vel membra tortuosa habuerit.[1]

Item q̣ ille qui exceptionem opponit non fuit vir illius mulieris legitimus, sed alius, cujus hæredes clamant hæreditatem illam. Item si machinatus fuit in mortem uxoris. Item licet partus editus & clamor auditus, et ille tenens vir legitimus, terra tamen de qua agitur nunquam accidit in vita uxoris, & unde pertinet ad veros h̥eredes, vel ad dominum capitalem. Item quia terra illa fuit hæreditas primi viri vel primæ uxoris, vel quia uxor sua tenuit nomine dotis, & non nomine successionis. Item quia uxor et mater pueri non obiit seysita ut de feodo. Item quia terra

[1] This side note is evidently out of its place, as it refers to matters discussed in the previous section.

because an offspring is monstrous, when it is not born as a human being. But I do not call an offspring monstrous, although nature may have diminished or amplified its members: diminished them, as in the defect of fingers or such like; amplified them, as if it has more fingers or joints, as six or more, when it ought not to have more than five; if nature has rendered the members useless, as if it has been crooked or hump-backed or has had twisted limbs. And it is to be noted that this exception has place as well in a cause of possession as in an assise of mortdancester or of novel disseysine, as in a cause of property by a writ of entry or by a writ of right. And it may be replied against the aforesaid exception, that no child at all has been brought forth, nor any cry heard, although a child was brought forth, because it died in the womb or in the birth. Likewise that none has been brought forth, but one has been substituted, although a cry has been heard. Likewise if brought forth, it was not formed as a human being, but as a monster. Likewise if brought forth, nevertheless it is convicted to be a bastard under any circumstances so that it cannot be by any means a near or a remote heir. f. 438 b.

11. If nature has rendered its limbs useless, or it is crooked or hump-backed or has twisted limbs.

Likewise because he who raises the exception is not the lawful husband of that woman, but another person whose heirs claim the inheritance. Likewise if he has contrived the death of his wife. Likewise although the offspring was brought forth and a cry was heard, and the said tenant was a lawful husband, nevertheless the land respecting which the action is brought never accrued in the lifetime of the wife, and thereupon it appertains to the true heirs or to the chief lord. Likewise because the said land was the inheritance of the first husband or of the first wife, or because his wife held it in the name of dower, and not in the name of a succession. Likewise because the wife and mother of the child did not die seysed as of fee. Likewise because the land, respecting which the action is brought, was

de qua agitur data fuit in maritagiū sub cōditione tacita vel expressa, videlicet si pueros non haberet vel si haberet & deficerent, q terra data reverteretur ad donatorem. Et quòd omnino nulli, vel si fuerint, defecerint, terra data in maritagium reverti debet ad donatorem. Item si pueri editi sunt et ꝑcreati, tamen hæredes esse non poterunt propinqui vel remoti non magis quàm bastardi, quia nihil clamare poterunt de hereditate mulieris, quia hæreditas illa sive maritagium datum fuit tali viro in maritagium cum tali uxore & heredibus de carne prædictorum procreatis, unde vir talis hereditatem tenere non debet ad vitam suam per legem Angliæ.

12. Si omnino nullus hæres existat, et tenens per vim se tenuerit in seysina.

Si autem nullus hæres omnino extiterit, & post mortem uxoris se teneat vir per vim in hæreditate mulieris contra verum hæredem sub specie & colore legis Angliæ, consulitur hæredi per tale breve per W. de Ralegh formatum pro Radulpho de Dadescomb in hac forma: Rex vicecomiti salutem. Ostendit nobis A. quòd cùm B. de N. & C. uxor ejus tenuissent tantam terram cum pertinentiis in tali villa ut jus et hæreditatem ipsius C., quæ nuper obiit sine hærede de corpore suo ꝑcreato (ut dicitur), unde terra illa descendere debuit ad prædictum A. sicut ad propinquiorem hæredem ipsius C., quia prædicta C. sine hærede de corpore suo ꝑcreato decessit. Idem B. post mortem prædictæ C. uxoris suæ contra legem & consuetudinem regni nostri cum vi sua se tenet in eadem, ita quòd p̃dictus A. in p̃dictam terram ut in jus & hæreditatem suam ingressum habere non potest. Et ideo tibi p̃cipimus q si prædictus A. fecerit te &c.,

given as a marriage-portion under a tacit or express condition, to wit, if she should not have sons, or if she should have them and they should fail, that the land given should revert to the donor. And that there are none at all, or if they have been born they have failed, and the land given as a marriage-portion ought to revert to the donor. Likewise if sons should have been born and procreated, nevertheless they will not be able to be near or remote heirs no more than bastards, because they could claim nothing of the inheritance of the woman, inasmuch as that inheritance or marriage-portion was given to the said husband as a marriage-portion with his said wife and to the heirs procreated of their flesh, wherefore the said husband ought not to hold the inheritance for his life by the law of England.

12. If no heir at all exists, and the tenant keeps himself by force in seysine.

But if no heir at all exists and after the death of his wife the husband keeps himself by force in the inheritance of the wife against the true heir under species and colour of the law of England, the heir is assisted by such a writ drawn up by William de Ralegh on behalf of Ralph de Dadescomb in this manner: The king to the viscount greeting. A. has shown to us that when B. de N. and C., his wife have held so much land with the appurtenances in such a vill as the right and inheritance of the said C., who lately died without an heir procreated from her body (as is said), whereby the said land ought to descend to the aforesaid A. as the next heir of the said C., because the said C. died without an heir procreated from her body; the said B. after the death of the said C. his wife, contrary to the law and custom of our realm, with force of his own maintains himself in the same, so that the aforesaid A. cannot have ingress into his right and his inheritance. And therefore we enjoin you that if the aforesaid A. has given you security &c., you should thereupon summon &c. the aforesaid B. that he

tunc sum̄oneas &c. prædictum B. quòd sit coram jus-
f. 439. ticiariis &c. ostensurus quare deforciat eidem A. prædictam terram, & habeas ibi summonitores &c.

Cap. XXXI.

1. Qualiter procedendum sit contra contumaces in actione personali.

Redeamus igitur ad diem summonitionis. Dictum est supra qualiter quis excusatur, si ad judicium non venerit cùm legitimè summonitus fuerit, cùm necesse habeat venire in actione reali. Nunc autem dicendum de contumacibus & ad judicium non venientibus, & qualiter ꝓcedendum sit contra contumaces in personali actione civili, & secundum quod fuerit ei contractum vel delictum. Et inprimis qualiter contra contumaces ꝓcedi debeat in actione personali, secundum quod actio fuerit civilis vel criminalis. Civilis, ratione delicti vel injuriæ, vel super aliqua promissione vel conventione non observata, vel finis facti in causa ꝓhibitionis, vel quare impedit vel hujusmodi, ubi principaliter agitur in rem, ad aliquam rem certam mobilē vel im̄obilē consequendam. Item civilis ꝓpter delictum vel injuriam, quæ quidem actio ꝓvenit ex aliquo facto & dicto p̃cedente, & ubi non agitur ad aliquam rem certam cōsequendam, sed ad interesse quod incertū est, donec ex discretione justiciariorū fuerit damnū & injuria estimata, secundū quod fuerit majus vel minus, & injuria atrox vel levis.

2. In actione criminali.

Item si causa fuerit criminalis et civiliter agatur eodem modo, quod quidem fieri ꝓtest, sed non è contrario. Poterit enim in causa criminali agi civiliter, sed in civili causa non criminaliter. Si autem ꝓsonalis causa fuerit criminalis, & maxima, scilicet de crimine læsæ majestatis, nulla erit ibi solennitas

present himself before our justiciaries &c. in order to show why he deforces the aforesaid A. from the said land, and do thou produce the summoners there.

Chapter XXXI.

1. How proceedings are to be had against contumacious persons in a personal action.

Let us return to the day of summons. It has been stated above how a person is excused, if he has not come into court when he has been lawfully summoned, when he ought to appear in a real action. Now we must speak of contumacious persons not appearing in court, and how proceedings are to be had against contumacious persons in a personal civil action, and according as there has been matter of contract or of delict. And in the first place in what manner proceedings ought to be taken against contumacious persons in a personal action, according as the action shall be civil or criminal. Civil by reason of a delict or injury, or upon the non-observance of some promise or convention, or by reason of a fine made in a cause of prohibition or a *Quare impedit* or such like, where the principal action is *in rem*, to obtain a certain movable or immovable thing. Likewise a civil action on account of a delict or an injury, which action indeed arises upon some preceding act or word, and where the action is not brought to obtain any certain thing, but for an interest which is uncertain, until by the discretion of the justiciaries the damage and the injury has been estimated, according as it should be more or less, and the injury severe or light.

2. In a criminal action.

Likewise if the cause should be criminal and the action be civil in the same manner, which may take place, but not the contrary. For civil proceedings may be taken in a criminal cause, but not criminal proceedings in a civil cause. But if a personal cause should be criminal and of the highest degree, as concerning the crime of high treason, there will there no solemnity of

attachiamentorum, sed statim capiatur per corpus, nec erit per plegios dimittendus, sed plegii ejus sint (donec se defenderit) carcer & gaola. Si autem majus sit crimen quod tangat privatas personas & non regem, sicut de morte hominis nequiter interfecti, de roberia, de crimine falsi, & hujusmodi, ubi sequitur amissio vitę & membrorū, fiat eodem modo secundū quod superius dictū est. Vix tamen aliquando retorquebitur à principe, quòd tales majori crimine irretiti per ballium dimittuntur. Si autem crimen minimum sit, quòd in se contineat interdictum vel exilium à villa vel à provincia, tales solent aliquando attachiari secundum quosdam. Cùm autem delictum fuerit vel transgressio vel injuria, licet contra pacem, ibi observari debet solennitas attachiamentorum sicut in aliis casibus civilibus, & personalibus actionibus. Et qualitur procedi debeat in casibus criminalibus, satis ppendi poterit ut supra in tractatu de placitis de corona. Sunt autem inter alias actiones civiles & personales, quæ ex causa certa instantiam desiderant, & non querunt dilationes, nec attachiamentorum solennitatem, sed maturitatem judicii, sicut videri poterit si res tempore peritura fuerit, sicut in fructibus & aliis. Item si periculum & jactura causæ immineat per lapsum vi. mensium, ne collatio ecclesiæ post tempus devolvatur ad episcopum. Item atrocitas injuriæ, et reverentia personæ, sive privilegium contra quē illata fuerit injuria contra pacē vel contra nobiles personas, vel extraneas qui moram trahere non possunt longam, sicut sunt mercatores & hujusmodi, et aliæ possunt esse causæ plures. Si autem sint actiones personales & civiles quæ instantiam non desiderant, et sum̄onitus legitimè ad diem sum̄onitionis non venerit, quia

Britton, i. ch. xxxiii. § 4.

f. 439 b.

attachments, but he shall be forthwith apprehended bodily, nor shall he be released on sureties, but let his sureties be the prison and the gaol until he has defended himself. But if his crime is of the greater kind, which touches private persons and not the king, as concerning the death of a man wickedly slain, concerning robbery, concerning forgery and such like, where the loss of life or of members follows, let it be done in the same manner as said above. With difficulty however it will be sometimes extorted by a chief, that such persons who are mixed up with a greater crime are released on bail. But if the crime be of a very slight character, which contains in itself an interdict or exile from a vill or a province, such persons are accustomed sometimes to be attached according to some authorities. But when the delict has been a trespass or an injury, although against the peace, in such a case there ought to be observed the solemn forms of attachment as in other civil cases and personal actions. And in what manner proceedings ought to be had in criminal cases may be sufficiently ascertained above in the treatise concerning the pleas of the crown. But there are amongst other civil and personal actions some which for a certain cause require instance, and do not admit of delays, nor the solemnity of attachments, but an early judgment, as may be seen if the thing is likely to perish in a short time, as in the case of crops and other things. Likewise if risk and loss of the cause be f. 439 b. imminent through a lapse of six months, lest the collation to a church should after a time devolve upon the bishop. Likewise the severity of the injury and the reverence for the person, or the privilege against which the injury has been inflicted against the peace or against noble persons, or foreigners who cannot support a long delay, such as merchants and such like, and there may be many other causes. But if there be personal and civil actions which do not requite instancy, and a party lawfully summoned has not appeared on the day of summons,

sine responsione sua procedi non possit ad judicium, offerente se liti querente contra sum̄onitum primo die litis, secundo, tertio, et quarto, ulterius non expectabitur sum̄onitus, sed procedatur contra ipsum q̄ attachietur per plegios, sive sum̄onitio testata fuerit sive non, cùm non sit dedicta.

3. Irrotulatio post defaltam.

Et fiat talis irrotulatio. A. optulit se quarto die versus B. de placito tali vel tali, quare videlicet non teneat ei conventionem vel finem factū vel hujusmodi. Sic inseratur et irrotuletur breviter virtus actionis et forma brevis, et tunc dicatur. Et talis nō venit & sum̄onitus &c. Judiciū. Attachietur quòd sit ad talem diem respōsurus de principali placito, et de defalta p̄ tale breve, q̄ tota die variatur secundū diversitatem actionum.

4. Breve de attachiando et ponendo aliquem per vadium et plegios in actione personali, cum fecerit defaltam.

Rex vicecomiti, salutē. Pone p̄ vadium et salvos plegios B. q̄ sit coram justiciariis nostris apud West. ad talē diem ad respondendum A. de placito quare non tenet ei conventionem inter eos factam vel finem inter eos factum de tanta terra cum pertinentiis in tali villa, vel sic: de tali placito q̄ warrantizat ei tantum terræ cum pertinentiis in tali villa quod tenet, et de eo tenere clamat, et unde chartam suam habet, vel chartas antecessorum suorum cujus hæres ipse est, ut dicit, vel sic: de placito quare non facit ei consuetudinem et certa servitia, quæ facere ei debet de libero tenemento suo quod de eo tenet in tali villa, vel de tanto terræ cum pertinentiis, vel de placito quod reddat ei tantam pecuniā quā ei debet et injustè deti-

because without his answer proceedings cannot go on to judgment, the plaintiff offering to join issue with the party snmmoned in the first, second, third and fourth day of the suit, the party summoned shall not be further awaited, but let proceedings be taken to attach him by sureties, whether the summons has been testified or not, since it is not denied.

3. An enrolment after default.

And let an enrolment of this kind be made. A. presented himself on the fourth day in answer to C. concerning such and such a plea, wherefore he does not hold good for him a convention or the making of a fine or such like. Let the substance of the action and the form of the writ be thus inserted and enrolled, and let it then be said. And the said party did not come and having been summoned, &c. Judgment. Let him be attached that he be present on a certain day in order to make answer in the principal plea, and concerning his default, by such a writ, which is varied every day according to the diversity of actions.

4. A writ to attach and to put under bail and sureties a certain person in a personal action, when he has made default.

The king to the viscount greeting. Put under bail and safe sureties B. that he should appear before our justiciaries at Westminster on such a day to make answer to A. concerning a plea wherefore he does not hold good for him a convention made between them or a fine made between them concerning so much land with its appurtenances in such a vill: or thus, concerning such a plea that he should warrant to him so much land with its appurtenances in such a vill, which he holds and claims to hold from him, and whereof he has his charter or the charters of his ancestors, whose heir he is, as he says: or thus, concerning a plea, wherefore he does not perform for him a custom and certain services, which he ought to perform for him concerning a free tenement which he holds from him in such a vill, or concerning so much land with its appurtenances, or concerning a plea that he should render to him so much money which he owes

net, ut dicit. Item de placito quare idē A. simul cum aliis venit ad domū suam et ibi fecit talem injuriam contra pacē nostram, et ita fiet breve de attachiamento secundum diversitatē actionum et querelarum, sed hæc exempli causa sufficiant. Et in fine addatur ei hæc clausula, ad ostendendum quare non fuit corā eisdē justiciariis nostris apud West. ad talem diem sicut sum̄onitus fuit, vel si ad alium diem essoniatus fuit tunc sic, & ad ostendendum quare non servavit diem sibi datum per essoniatorem suum ad talem terminum, et quo casu si ad primum attachiamentum venerit, inprimis respondeat quare ad diem sum̄onitionis, vel ad diem sibi datum per essoniatorem suum non venerit, et si se excusare non possit antequam respondeat de principali, erit in misericordia pro defalta. Si autem ad primum attachiamentum non venerit, tunc offerente se liti querente, attachietur pars fugiens per meliores plegios, quòd sit ad alium diem responsurus, quod quidem dicitur aforciamentum plegiorum, et quod sit ad similitudinem districtionum quæ fiunt pro servitiis et consuetudinibus, ubi primò et ad primam districtionem capiuntur averia si tenens ad diem summonitionis non venerit, & si ad alium
f. 440. diem per talem districtionem non venerit, capiuntur plura, et retinentur prius capta pro afforciamento districtionis &c. ulterius ut infra, & ita fiat irrotulatio: A. optulit se quarto die versus B. de tali placito ut supra, et B. non venit et aliàs fecerit defaltam postquàm fuit summonitus, & ita quòd attachiatus tunc fuit per C. et D. Judicium. Ponatur per meliores plegios quòd sit ad talem diem et primi &c. Forma brevis talis est.

to him and unjustly detains, as he says. Likewise concerning a plea wherefore the said A. came together with others to his house, and there did such an injury against our peace; and so the writ shall be drawn up concerning the attachment according to the diversity of actions and plaints, but let these suffice for the purpose of example. And in the end let there be added to it this clause, in order to show wherefore he was not present before our justiciaries at Westminster on such a day as he was summoned; or if he has been essoined to another day, then thus: and in order to show wherefore he did not observe the day appointed to him through his essoiner at such a term; and in which case, if he has come at the first attachment, let him in the first place answer wherefore he did not appear on the day of the summons or on the day appointed to him through his essoiner, and if he can excuse himself before he answers on the principal plea, he will be amerciable for his default. But if he has not come at the first attachment, then on the plaintiff presenting himself to join issue, let the fugitive party be attached by better sureties, that he be present on another day in order to make answer, which is called an enforcement of the sureties, and which is done after the likeness of distresses which are made for services and customs, where in the first place and on the first distress cattle are seized, if the tenant has not come on the day of summons, and if he has not come on another day, through such a distress, more cattle are seized, and the first seized are detained for the enforcement of the distress &c., further as below, &c., and so let the enrolment be made: A. presented himself on the fourth day against B. on such a plea as above, and B. did not come, and otherwise made default after he was summoned, and so he was attached through C. and D. Judgment. Let him be put under better sureties that he present himself on a certain day, and let the first &c. The form of the writ is of this kind. f. 440.

5. Breve de attachiando per meliores plegios.

Rex vicecomiti salutem. Pone per vadium et meliores plegios B. de N. quòd sit coram justiciariis nostris &c. ad respondendum A. de placitis &c. secundum formam brevis originalis, et ad ostendendum quare non fuit coram eisdem justiciariis nostris &c. tali die sicut attachiatus fuit. Et summoneas per bonos summonitores C. &c. D. primos plegios ipsius B. quòd sint coram eisdem justic. ad præfatum terminum audituri judicium suum de hoc, quòd prædictum B. in eadem curia nostra coram eisdem justiciariis nostris non habuerint, sicut eum plegiaverint, et habeas ibi nomina secundorum plegiorum et hoc breve.

6. Qualiter et quando plegii sint amerciandi.

Ad quem diem si reus non venerit, nec plegii ad ostendendum quare prædictum reum non habuerunt, omnes plegii erunt in misericordia, et reus non antequam comparuerit, vel quia plegii ei deficiunt, tunc primò incipiunt omnes defaltæ in persona ejus ac si plegios non invenisset, sicut videri poterit in fine brevis subsequentis, ubi dicitur: quòd sit ad audiendum judicium suum de pluribus defaltis, & ex hoc die cessabunt omnia afforciamenta plegiorum. Si autem post secundum attachiamentum reus compareret, tunc solummodo amerciandi sunt primi plegii et non secundi, nisi venirent et docerent quare eum ad primum attachiamentum non haberent. Et quòd omnes plegii amerciandi sunt, si ad secundum attachiamentum non venerint, nec reum habuerint, et ipse reus non, antequam fuerit summonitus ad audiendum judicium suum de pluribus defaltis, probatur in rotulo de termino S. M. anno regis Henrici ix. incipiente x., in comitatu Eborum, de Nicholao de Statevil. Sed contra (ut videtur), si quis plegios invenerit de prosequendo, et

5. A writ to attach under better sureties.

The king to the viscount greeting. Place under bail and better sureties B. de N., that he present himself before our justiciaries, &c., to answer to A. concerning the pleas, &c., according to the form of the original writ, and in order to show wherefore he was not present before our said justiciaries, &c. on such a day, as he was attached. And summon by good summoners C. and D., the first sureties of the said B., that they be present before the said justiciaries at the aforesaid term, in order to hear their judgment concerning this, that they did not present the aforesaid B. in our said court before our aforesaid justiciaries, according as they have been sureties for him; and have there the names of the second sureties and this writ.

6. In what manner and when the sureties are to be amerced.

At which day, if the defendant has not appeared, nor the sureties in order to show wherefore they have not produced the defendant aforesaid, all the sureties will be amerciable, and the defendant not before he has appeared, or because his sureties fail him, then for the first time all the defaults in his person commence, as if he had not found sureties, as may be seen at the conclusion of the subsequent writ, where it is said: that he be present in order to hear his judgment for several defaults, and from that day shall cease all enforcements of the sureties. But if the defendant has appeared after the second attachment, then the first sureties alone, and not the second, are to be amerced, unless they should come and should show wherefore they did not produce him to the first attachment. And that all the sureties are to be amerced, if they have not come to the second attachment, nor have produced the defendant, and the defendant himself not, before he has been summoned to hear his judgment for several defaults, is proved in the roll for St. Michael's term in the ninth and tenth years of king Henry, in the county of York, concerning Nicholas de Statevil. But on the contrary (as it seems) if any one has found sureties for prosecuting, and has

non fuerit prosecutus, omnes erunt in misericordia tam plegii quàm principales, sed revera non est simile, quia in hoc ultimo casu, omnes sunt in culpa, querens scilicet quia non prosequitur, & plegii quia non est prosecutus secundum quod eum plegiaverunt. Et quia sunt plegii de faciendo ad obligationem querentis, et alii in superiori casu seipsos obligant tantum factum alterius promittendo, et de habendo talem ad diem summonitionis. Si autem fortè contingat quòd ad primum diem summonitionis vel attachiamenti non veniat summonitus sive attachiatus, nec querens, adhuc non cadit breve, & continuari potest actio, et querens sequi poterit quando voluerit, ex quo sum̄onitus sive attachiat^{9} se liti non obtulit, nec sine die recessit. Et unde si cùm ad aliū diem apparuerit et judiciū petierit de defalta querentis ad primū diem, non valebit ei facta compensatione defaltæ ad defaltam, quia paria delicta mutua compēsatione tolluntur ut supra. Cùm autem attachiatus per meliores plegios ad diem suum
f. 440 b. non venerit, nec infra quartū diem offerente se liti q̄rente, fiat ita irrotulatio: A. optulit se quarto die versus B., & B. non venit &c., & plures fecit defaltas, ita quòd primò attachiat^{9} fuit p̄ C. et D. et secūdò per E. et F., et ideo omnes plegii in misericordia, & est ratio, quia ulterius non sunt sum̄onendi quòd sint ostensuri quare eum non habuerunt sicut eum plegiaverunt, et tunc præcipietur vicecomiti quòd habeat corpus ejus ad aliū diem per tale breve: Rex vic. salutē. Præcipimus tibi q̄ habeas corā justic. nostris &c. ad talem diē corpus A. ad respondendū B. de

not prosecuted, all will be amerciable, as well sureties as principals; but in truth it is not alike, because in this last case all are in fault, the plaintiff forsooth because he does not prosecute, and the sureties because he has not prosecuted according as they have pledged themselves for him. And because they are sureties to perform according to the obligation of the plaintiff, and others in the above case oblige themselves as much by promising the act of another and to produce the said party on the day of summons. But if by chance it should happen that on the first day of the summons or of the attachment the party summoned or attached does not come, nor the plaintiff, still the writ does not abate, and the action may be continued, and the plaintiff may sue when he may wish, since the party summoned or attached has not presented himself to join issue, nor has withdrawn without a day. And hence if he shall have appeared on another day, and claimed judgment upon the default of the plaintiff on the first day, it shall not avail him, compensation for the default having been made by his default, because like offences are taken away by mutual compensation, as above. But when the party who has been attached by better sureties has not come upon his own day, nor within the fourth day, the plaintiff pre- f. 440 b.
senting himself to join issue, let an enforcement of this kind be made: A. presented himself on the fourth day against B., and B. did not come, &c., and made several defaults, so that he was at first attached through C. and D., and secondly through E. and F., and accordingly all the sureties are amerciable, and there is reason, because they are not to be further summoned in order to show wherefore they have not produced him as they pledged themselves to do; and then let it be enjoined to the viscount that he produce his body on another day by a writ of this kind: The king to the viscount greeting. We enjoin you that you produce before our justiciaries, &c. on such a day the body of A, to answer to B. con-

placito tali (ut supra) secundū formā brevis originalis, & in fine addatur hæc clausula, ad audiendū judiciū suū de pluribus defaltis, et habeas ibi hoc bŕe. Teste &c. Et ad q̃m diē si venerit, inprimis si se salvare nō possit de defaltis, ad diē illū retrotrahūtur omnes defaltæ et p̄ omnibus amerciabitur, et postea respondeat ad principale placitū. Si autē ad diē illū nō venerit, sed malitiosè se subtraxerit et latitaverit corp^{9} inveniri nō possit, vel forte se transtulerit extra com̃, extra potestatē vic., et vic. hoc mandaverit q̄ inveniri nō possit in balliva sua, fiat talis irrotulatio: A. optulit se quarto die versus B. talē de tali placito &c. ut supra, et B. nō venit, et plures fecit defaltas, ita q̄ p̄ceptū fuit vic. q̄ haberet corp^{9} ej^{9}, et vic. mādavit q̄ nō fuit invent^{9} in balliva sua, et ideo vic. distringat eū p̄ omnes ĩras et catalla, q̄ sit ad talē diē p̄ tale bŕe, et tunc fiat simplex districtio ita q̄ ĩræ et catalla simpliciter capiantur in manū dñi regis.

7. Breve, quod distringatur quis per terras et catalla et ulterius per ordinem.

Rex vic. salutē. Præcipimus tibi q̄ distringas B. p̄ ĩras et catalla in balliva tua q̄ sit corā &c. ad talē diē ad respōdendū A. de tali placito &c. Et in fine addatur, et ad audiendū judiciū suū de pluribus defaltis. Et si ad diē illū venerit, tūc fiat de defalta ut supra, et si nō venerit, adhuc aggravari debet districtio, s. q̄ vic. distringat ipsum per ĩras et catalla q̄ sit securus habendi corpus ejus ad aliū diem. Et si tūc non venerit, q̄ vic. tunc distringat eū p̄ ĩras et catalla ita q̄ nec ipse nec aliquis p̄ eo nec per ipsum

cerning such a plea (as above), according to the form of the original writ, and at the end is added this clause, in order to hear his judgment concerning several defaults, and produce there this writ. Witness, &c. And upon which day if he shall have come, in the first place, if he cannot save himself concerning the defaults, all the defaults are drawn back to that day, and he shall be amerced for all, and afterwards let him answer for the principal plea. But if he shall not have come on that day, but shall have maliciously withdrawn himself and have lain hid so that his body cannot be found, or by chance shall have transported himself out of the county beyond the power of the viscount, and the viscount shall have reported that he cannot be found in his bailiwick, let an enrolment of this kind be made: A. presented himself on the fourth day in answer to B. so-and-so, concerning such a plea, &c., as above, and B. has not come, and has made several defaults, so that it was enjoined to the viscount to distrain him by all his lands and chattels, that he should be present at such a day by such a writ, and then let there be made a simple distress, so that the lands and chattels be taken simply into the hand of the lord the king.

7. A writ, that a person be distrained by his lands and chattels and further in order.

The king to the viscount greeting. We enjoin you that you distrain B. by his lands and chattels in your baliwick that he present himself, &c., on such a day in order to make answer to A. on such a plea, &c.; and at the end let there be added, and to hear his judgment concerning several defaults. And if he shall have come on that day, then let it be done concerning his default as above; and if he should not have come, the distress ought to be further aggrevated, to wit, that the viscount should distrain him by his lands and chattels that he may be secure of producing him on another day. And if he shall not have then come, that the viscount should then distrain him by his lands and chattels so that neither he himself nor any one in his place nor

manū apponat in terris, tenementis, bladis nec in aliis catallis. Et si tunc non venerit, p̃cipiatur vic. q̄ ita distringat eum p̄ terras et p̄ catalla q̄ capiat omnes t̃ras et omnia catalla sua in manū dñi regis, & capta in manū dñi regis detineat, quousq̄ dñus rex aliud inde p̃ceperit, et q̄ de exitibus respondeat dño regi. Et de hac materia inveniri poterit de term̄ S. M. añ regis H. iii. incipiente iv. circa finem rotuli. Ulterius vero fieri non poterit aliqua districtio p̄ terras et catalla. Sed cùm quærens post tot et tantas dilationes justitiam non fuerit cōsecutus, quid erit? durū est enim q̄ placitū suū deserat, et infecto negotio desperat^{9} recedat domū. Bonum esset igitur (ut videtur) distinguere inter placita sive actiones civiles, utrū videlicet actio esset personalis et pecuniaria descēdens ex cōtractu, quo casu bonū esset adjudicare querēti ab initio seysinā catallorū secundū quantitatem debiti petiti, et dare ei diē et sum̄onere illū de quo queritur. Et si ad diē sum̄onitionis veniret, extunc restituerētur ei catalla, ita q̄ super principali responderet, si autem non, quòd ulterius super catallis non audiretur, sed querens extunc verus possessorius efficeretur. Si auem placitum esset civile descendens ex
f. 441. delicto sicut actio injuriarum, quòd tunc per officium justic. æstimaretur injuria, et adhibita taxatione de redditib^{9} et catallis fugientis, caperetur in manū dñi regis ad valentiam p̄ contumacia ipsius, & fieret eodem modo sicut supra. Si autē cùm corpus non inveniatur, nec terras habuerit nec catalla ille de quo queritur, iniquum esset si justitia remaneret vel malitia esset

through him should put his hand to his lands or tenements or grain crops or other chattels. And if he shall then not have come, let it be enjoined to the viscount, that he should so distrain him by his lands and chattels that he should take all his lands and chattels into the hand of the lord the king, and keep them so taken in the hand of the lord the king, until the lord the king shall have otherwise enjoined, and that he shall answer to the king for the outgoings. And on this matter a case may be found in St. Michael's term in the third and fourth years of king Henry, about the end of the roll. But a distraint by lands and chattels cannot be made any further. But when the claimant, after so many and such great delays, has not obtained justice, what will result? for it is hard that he should give up his plea and should return home in despair with his business unfinished. It is good therefore (as it seems) to distinguish between pleas or civil actions, whether forsooth the action be personal and pecuniary, founded on a contract, in which case it will be good to adjudicate to the plaintiff from the commencement the seysine of the chattels according to the quantity of the debt claimed, and to give him a day, and to summon the person concerning whom he complains. And if he shall come on the day of summons, thereupon let there be restored to him the chattels, so that he may be heard on the principal question, but if not, that he may be not further heard upon the chattels, but the plaintiff be thenceforth constituted the true possessor. But if it be a civil plea founded on a delict, as for instance an action for an f. 441. injury, that then through the office of the justiciary the injury be estimated, and a taxation having been made of the rents and chattels of the fugitive, let there be taken into the hand of the king up to the value on account of the contumacy of the said party, and let it be done in the same way as above. But if when his body is not found and he, of whom complaint is made, has no lands or chattels, it would be inequitable if justice should be

impunita. Et in utroq̃ casa sive causa esset pecuniaria sive injuriarum, etiam quamvis non criminalis, quòd talis de secta querentis interrogaretur de coñ in coñ ppter contumaciā & inobedientiam factam dño regi, quia nullum majus crimen quâm contemptus et inobedientia, omnes enim qui in regno sūt obedientes esse debent dño regi, & ad pacem suam, & cûm vocati vel sum̄oniti per regem venire contempserint, faciūt seipsos exleges, & ideo utlagari deberent, non tamen ad mortem vel membrorū truncationem si postea redierint, vel intercepti fuerint, cùm causa utlagationis criminalis non existat, sed ad perpetuam prisonam, vel regni abjurationem, et à communione omnium aliorum qui sunt ad pacem dñi regis; et sicut causa excom̄unicationis facit excom̄unicationem "minorē et pœnam, ita causa "utlagationis facit utlagationē esse minorem & pœnam, "& facilius debet invenire gratiā q̃ taliter utlagatus "restituatur ad pacē. Excom̄unicatio enim et utlagatio in multis ad paria judicantur.

Cap. XXXII.

1. De returnis vicecomitis, etsi vicecomes negligens fuerit.

Redeamus ad juditium districtionum et attachiamentorum, quia aliquando vicecom̄ negligens sit in executione præceptorum domini regis per fraudem, aliquando illa exequi non possit propter impotentiam, et unde nisi rationabilem prætendat excusationem, in misericordia domini regis remanebit. Contingit ei quandoque, quod cûm breve domini regis suceperit de attachiando aliquem post sum̄onitionem factam, quod

stayed or malice be unpunished. And in either case, whether the cause were for money or on account of injury, even although not criminal, so that the said party upon the pursuit of the complainant may be sought for from county to county on account of his contumacy and disobedience to the lord the king, for there is no greater crime than contumacy and disobedience, for all persons within the realm ought to be obedient to the lord the king and within his peace, and when having been called or summoned by the king they have contumaciously omitted to come they make themselves outlaws, and accordingly ought to be outlawed, not, however, to lead to death or loss of limbs if they have afterwards returned or have been intercepted, since the cause of their outlawry has not been criminal, but to perpetual imprisonment or the abjuration of the realm, or excommunication from all those who are within the peace of the lord the king; and as the cause of the excommunication makes the excommunication and the penalty of minor degree, so the cause of the outlawry makes the outlawry and the penalty of minor degree, and he ought more easily to find grace, that having been outlawed under such circumstances he should be restored to the peace [of the king]. For excommunication and outlawry are in many respects judged alike.

Chapter XXXII.

1. Of the returns of the viscount, and if the viscount has been negligent.

Let us return to the judgment of distraints and attachments, because sometimes the viscount is neglectful in the execution of the precepts of the lord the king through fraud, sometimes he cannot execute them from powerlessness, and hence unless he can hold forth a reasonable excuse, he will remain at the mercy of the lord the king. It happens sometimes to him, that when he has received a writ of the lord the king for attaching a certain person after a summons has been made, that he does not make an attachment against him, nor does he

attachiamentum non facit, nec breve quod ei inde venit remittit, quo casu (offerente se liti querente) fiat talis irrotulatio: A. optulit se quarto die versus B. de tali placito vel tali (secundum diversa genera placitorum personalium), & B. non venit, & præceptum fuit vic. q attachiaret eum q esset ad talem diem, et ipsē vicecomes inde nihil fecit, nec bře q ei inde venit misit, et ideo præceptum est vic. sicut aliàs, quòd attachiaret eum quòd sit ad talem diem, & q ipse vic. tunc sit ibi auditurus judicium suum de hoc q prædictum talem non attachiavit, nec breve quod ei inde venit misit sicut ei præceptum fuit. Forma brevis talis est.

2. Pone sicut alias.

Rex vicecom̃ salutem. Præcipimus tibi sicut aliàs tibi præceperimus, q ponas per vadium et salvos plegios A. q sit coram justic. &c. ad talem diem ad respondendum &c. ut supra. Et in fine addatur hæc clausula, et tuipse tunc sis ibi auditurus judiciū tuum de hoc q ipsum A. non attachiasti, nec bře nostrum quod inde tibi venit justiciariis nostris non misisti, sicut aliàs tibi præceptum fuit, & habeas, &c. Teste, &c. Et ad quem diem si nihil inde fecerit magis quàm prius fecit, nec se excusaverit, p voluntate dñi regis amerciabitur de contemptu, et tertiò p̃cipietur ei q attachiet A. per tale bře: Præcipimus tibi sicut sepius tibi p̃ceperimus &c. ut supra.

f. 441 b.

3. De fraude vicecomitis.

Mittit quandoq̃ vicecom̃ bře quòd inde susceperit, et fraudulenter rescribit et mandat q breve tam tardè ceperit quòd præceptum dñi regis exequi non potuit, quo casu, si in contrarium testatum fuerit q illud

return the writ which came to him, in which case (when the complainant appears to join issue) let an enrolment of this kind be made: A. presented himself on the fourth day in answer to B. concerning such a plea or such (according to the different kinds of personal pleas), and B. did not appear, and it was enjoined to the viscount that he should attach him that he should present himself on such a day, and the said viscount has done nothing thereon, nor has he sent the writ which came to him, and accordingly it has been enjoined to the said viscount as before, that he should attach him to be present on a certain day, and that the viscount himself should attend to hear his own judgment on this matter that he has not attached the aforesaid so-and-so, nor has returned the writ which came to him as it was enjoined to him. The form of the writ is of this kind.

2. A pone as before.

The king to the viscount greeting. We enjoin you as we have before enjoined you that you put A. under bail and safe sureties that he should present himself before our justiciaries &c. on such a day to answer &c. as above. And at the end let there be added this clause, and do thou thyself be there in order to bear thy own judgment for not having attached A., and for not having returned to our justiciaries our writ which was sent to thee, as was before enjoined to thee, and produce &c. Witness &c. And on which day if he has thereon done nothing more than he did before, nor has excused himself, he shall be amerced at the pleasure of the lord the king for his contempt; and let him be enjoined for the third time that he should attach A. by a writ of this tenor: We enjoin you as we have repeatedly enjoined you &c. as above.

f. 441 b.

3. Of the fraud of a viscount.

The viscount sometimes returns a writ which he has received, and fraudulently writes back and sends word that he has received the writ so late that he could not execute the precept of the lord the king, in which case, if it has been testified to the contrary that he received it

tempestivè recepisset, ita quòd potuit attachiasse talem si vellet, vel quòd breve fuit ei liberatū in pleno coñ, ubi ipse p̃sens fuit qui attachiari debuit, et potuit attachiari. Item si fraudulenter mandavit quôd ille qui attachiari debuit non fuit inventus in balliva sua, quia manens fuit extra comitatū suum, et testatum sit in contrarium q manens sit in coñ suo, et ibi habeat reseantiam suam. Item si fraudulenter mandaverit q ille qui attachiari debet itinerans est de loco in locum, et de coñ in coñ vagans, nec certum habet domicilium, nec quòd sit de alicujus manupastu vel familia, et testatū est in contrariū quòd domiciliū habeat, et reseantiā apud talem locū certū, ubi quotidie inveniri possit, vel quòd sit de manupastu vel familia talis. Item cùm p̃ceptū fuerit vic. quòd distringeret talem per terras et catalla, et falsò rescribat justic. et mandat quòd talis non habet terras nec catalla per quæ distringi possit vel attachiari in balliva sua, et testatum fuerit in contrarium quòd terras habeat et catalla ad sufficientiam in balliva sua, tali loco et tali. Et unde infiniti sunt casus de genere isto, ubi vic. per fraudem rescribit et prætendit non causam ut causam

4. De imperitia vicecomitis.

Item si p imperitiam suam erraverit in modo et ordine attachiamentorum et districtionū, ut si præceptū sit ei q ponat per vadium et salvos plegios, et ipse mandavit q distrinxit per terras et catalla vel è contrario. Item si preceptū sit ei quòd habeat corpus, et ipse mandaverit q attachiavit p plegios vel comisit per ballivū vel hujusmodi, et unde sunt casus multi. Et unde vicecoñ modo debito precept dñi regis non sit executus, de omnibus hujusmodi mandatis oportebit in irrotulationibus et brevibus facere mentionem, & fiat irrotulatio sic: A. optulit se quarto die versus

in good time, so that he could have attached so-and-so if he chose, or that the writ was delivered to him in a full county court, where the said person who ought to have been attached was present and might have been attached. Likewise if he has fraudulently sent word that the person who ought to have been attached was not found within his bailiwick, because he was abiding outside his county, and it has been testified to the contrary that he was abiding in his county, and had there his residence. Likewise if he has fraudulently sent word that he who ought to be attached is travelling from place to place, and is wandering from county to county, and has no certain domicile and that he is not of so-and-so's household or family. Likewise when it has been enjoined to the viscount that he should distrain so-and-so by his lands and chattels, and he falsely writes back to the justiciaries and sends word that so-and-so has no lands or chattels, whereby he could be distrained or attached, within his bailiwick, and it has been testified to the contrary, that he has sufficient lands and chattels in his bailiwick, at such and such a place. And whereof there are an infinite number of cases of that kind, where the viscount writes back fraudulently and pretends as an excuse what is not an excuse.

4. Of the inexperience of the viscount.

Likewise if from inexperience he has erred in the manner and order of attachments and distresses, as if it be enjoined that he should put under bail and safe pledges, and he has sent word that he has distrained by lands and chattels, or the contrary. Likewise if it has been enjoined that he should produce his body, and he himself has returned that he has attached him by sureties or has committed him by his bailiff or such like, and whereof there are many cases, and wherever the viscount has not executed the precept of the lord the king in due manner, concerning all these returns it is incumbent to make mention in the enrolments and in the writs, and let the enrolment be made after this manner: A. has presented

B. de tali placito personali, & B. non venit, et vicecom̃ mãdavit q̃ non attachiavit eum, quia recepit b̃re tam tarde quôd præceptũ dñi regis exequi non potuit. Et testatũ est q̃ istud recepit satis tempestivè vel in comitatu ubi attachiandus præsens fuit, & ideo (ut prius) præcipiatur quòd attachiet eum quòd sit ad talem diem &c., et vicec. tunc sit ibi auditurus judicium suũ de hoc q̃ eundẽ B. non attachiavit sicut ei præceptũ fuit. Et in hac forma fiat irrotulatio in omnibus aliis mandatis vicecom̃ supradictis. Forma brevis talis est, quod sequitur talem irrotulationem.

5. Breve de attachiando ulterius, sicut alias vel pluries, ubi vicecomes negligens fuerit.

f. 442.

Rex vicecomiti salutem. Præcipimus tibi sicut aliàs tibi præceperimus quòd ponas per vadium et salvos plegios A. quòd sit ad talem diem, &c. ut supra, ad respondendum tali de tali placito personali; vel aliter: præcipimus tibi sicut aliàs tibi præceperimus quòd distringas talem per omnes terras et catalla sua in balliva tua q̃ sit coram justiciariis nostris ad talem diem ad respondendũ B. de tali placito personali, vel tali, secundũ formam brevis originalis. Et unde mandasti præfatis justiciariis nostris apud talem locum, quòd breve nostrũ de attachiando prædictũ B. talem adeo tardè tibi venit quòd præceptũ nostrũ exequi non potuisti, & testatum est ibidem quòd illud satis tempestivè ad horam recepisti, quod illud præceptũ nostrũ exequi potuisti; vel sic: quòd illud recepisti in pleno comit̃ ubi prædictus B. præsens fuit, &c. ut supra. Et tu ipse tunc sis ibi auditurus judiciũ tuum de hoc quòd prædictũ B. non attachiasti quòd esset ad talem diem sicut tibi præceptũ fuit, et habeas ibi

himself on the fourth day in answer to B. on such a personal plea, and B. has not appeared, and the viscount has reported that he has not attached him, because he received the writ so late that he could not execute the order of the lord the king. And it has been testified that he received it soon enough, or in the county court where the party to be attached was present, and therefore (as before) let him be enjoined to attach him in order that he should be present on a certain day, &c.; and the viscount himself should be there in order to hear his own judgment on the matter that he did not attach the said B. as he had been enjoined. And let the enrolment be after this form in all the other returns aforesaid of the viscount. The form of the writ, which follows such an enrolment, is of this kind.

5. A writ to attach further, as once or repeatedly before, where the viscount has been negligent. f. 442.

The king to the viscount greeting. We enjoin you, as we have once before enjoined you, that you put under bail and safe sureties A. that he should present himself on such a day &c. as above, in order to answer so-and-so on such a personal plea; or otherwise, we enjoin you, as we have once before enjoined you, that you should distrain so-and-so by all his lands and chattels in your bailiwick, that he should present himself before our justiciaries on a certain day in order to answer to B. concerning such or such a personal plea according to the form of the original writ. And whereof you have sent word to our aforesaid justiciaries at such a place that our writ to attach the aforesaid B. has come to you so late that you could not execute our precept, and it has been testified there that you received it at so early an hour that you could have executed that our precept; or thus: that you received it in a full county court where the aforesaid B. was present &c. as above. And do thou thyself be present in order to hear thine own judgment in the matter, that thou didst not attach the aforesaid B. that he should be present on such a day as had been to thee enjoined, and produce there the names of the sureties

nomina plegiorū & hoc breve. Teste, &c. Et ad quem diem si non attachiaverit, nec se excusaverit, in misericordia remanebit.

6. De excusatione vice comitis.

Excusatur vicecom̃ multotiens ꝑpter libertatem, et impotentiam quòd libertates sine warranto ingredi non possit, nisi per defectū eorū qui libertates habent et returna brevium per vicecom̃. Et unde si præceptū sit vicecomiť quòd attachiet talem qui manens sit infra hujusmodi libertates, cùm vic. ingredi non possit, faciat vicecom̃ returna breviū ballivis prædictæ libertatis, et præcipiat ballivis quòd tale preceptū dñi regis exequantur, quo casu aut ipsi ballivi exequuntur præceptum domini regis, aut nihil inde faciunt; si autem illud plenè fuerint executi, per hoc liberabitur vicecomes; si autem nihil inde fecerint, sufficiat ad excusationem vicecom̃ q̃ mandet justic. quòd præceptū sit ballivis. Et quo casu, cùm ballivi nihil inde fecerint, ꝑpter defectū eorum præcipietur vicecom̃ quòd non omittat ꝑpter libertatem talem quin attachiet talem quòd sit &c. Et sic poterit vicecomes libertates ingredi cûm warrantum habuerit, quod aliàs ei non liceret, et fiat sic irrotulatio: A. optulit se quarto die versus B. de tali placito, & B. non venit, et præceptum fuit vicecom̃ quòd attachiaret eum vel quòd haberet corpus suum, vel quod distringeret eum per terras et catalla. Et vicecomes mandavit quòd præcepit ballivis talis libertatis et ipse nihil inde fecerunt, et ideo præceptum est vicecom̃ q̃ non omittat propter libertatem talem quin ponat per vadium et plegios prædictum B., vel quin habeat corpus ejus, vel quin

and this writ. Witness &c. And upon which day, if he has not attached him nor excused himself, he shall be at the mercy of the court.

6. Of the excuse of the viscount.

The viscount is excused very often on account of a franchise and his powerlessness, because he cannot enter a franchise without a warrant, except through the failure of those who have franchises and the returns of writs through the viscount. And hence if it has been enjoined upon the viscount that he should attach a certain person who is abiding within franchises of this kind, when the viscount cannot enter them, let the viscount make returns of the writs to the bailiffs of the aforesaid franchise, and let him enjoin upon the bailiffs that they should execute the said precept of the lord the king, in which case either the bailiffs themselves execute the precept of the lord the king, or do nothing thereupon; if however they have executed it fully, the viscount will be thereby discharged; but if they have done nothing thereof, let it suffice for the excuse of the viscount that he should report to the justiciaries, that he has issued a precept to the bailiffs. And in which case, when the bailiffs have done nothing thereon, on account of their default let it be enjoined to the viscount, that he shall not omit on account of the said franchise to attach the said person that he should present himself &c. And thus the viscount may enter the franchises when he has had a warrant, which otherwise would not be allowable for him, and let the enrolment be in this manner: A. has presented himself on the fourth day in answer to B. concerning such a plea, and B. has not appeared, and it has been enjoined upon the viscount that he should attach him, or that he should produce his body, or that he should distrain him by his lands and chattels. And the viscount has reported that he has enjoined the bailiffs of the said franchise, and they have done nothing thereupon, and accordingly it was enjoined upon the viscount that he should not omit on account of that franchise to put the said B. under bail and sureties

distringat eum per terras et catalla, vel quin capiat in manum domini regis talem terram, vel aliud quid faciat secundū p̃ceptū dñi regis, et ballivus sum̄oneatur per vicecom̃ q̄ sit responsurus quare p̃ceptum domini regis non fuit executus, & fiat breve in hac forma.

7. Breve, quod vicecomes non omittat propter libertatem.

Rex vic. salutem. Præcipimus tibi quòd nō omittas propter talem libertatem talis quin ponas B. per vadium et salvos plegios quòd sit &c. ad respondendum &c.; vel aliter, secundum quod præceptum est &c. ut supra. Et unde mandasti justiciariis nostris &c. quòd mandasti ballivo vel senescallo talis libertatis, quòd attachiet eum quôd esset ad talem diem &c., et unde nihil fecit, et sum̄oneatur per bonos summonitores prædictus ballivus vel senescallus, quòd sit coram p̃fatis justiciariis nostris ad prædictum terminum responsurus quare præceptum nostrum non fuerit executus, vel quare prædictum non attachiavit, vel quid
f. 442 b. tale non fecit, sicut ei præceptū fuit, vel aliter (secundū quosdā) q̄ ballivus sit auditurus inde judicium suū de hoc &c. Et si forte cùm vic. ingredi voluerit hoc non ei permittatur p̄pter potentiam ballivorū libertatis, præcipiatur (ut prius) vic. q̄ non omittat p̄pter libertatē talem, quin attachiet talē in forma p̃dicta. Et si aliquē invenerit resistentē, assumptis secū (si op⁹ fuerit) militibus et liberis hominib⁹ de com̃ ad sufficientiā capiat corpora hominū resistentiū, et illos in prisona salvo custodiat, donec dominus rex inde p̃ceperit voluntatem suam. Et nihilominus dominus libertatis attachietur q̄ sit ad prædictū diem ad defenden-

or to produce him in person, or to distrain him by his lands and chattels, or to take into the hand of the king such a land, or to do some other thing of a like character according to the precept of the lord the king, and let the bailiff be summoned through the viscount that he should be present in order to make answer wherefore he has not executed the precept of the lord the king, and let the writ be drawn up in this form.

7. A writ, that the viscount should not omit on account of a franchise.

The king to the viscount greeting. We enjoin you that you do not omit on account of a certain franchise of so-and-so to put B. under bail and safe sureties that he present himself &c. in order to make answer &c., or otherwise, according to what has been enjoined &c. as above. And whereon you have made a return to our justiciaries &c. that you have sent word to the bailiff or steward that he should attach him that he should be present on such a day &c., and whereof he has done nothing; and let the aforesaid bailiff or steward be summoned by good summoners that he should present himself before our aforesaid justiciaries at the aforesaid term, in order to answer wherefore he has not executed our precept, or wherefore he has not attached the person aforesaid, or has omitted to do something of the same kind, as has been enjoined upon f. 422 b. him, or otherwise (according to some persons), that the bailiff attend in order to hear his own judgment thereon &c. And if by chance when the viscount wished to enter, this was not permitted to him on account of the power of the bailiff of the franchise, let it be enjoined (as before) upon the viscount, that he should not omit on account of that franchise to attach the said person in the form aforesaid. And if he should find any one resisting him, having associated with himself, if it should be necessary, knights and freeholders of the county in sufficient number, let him seize the bodies of the men who resist him, and keep them safe in prison, until the lord the king shall have intimated his pleasure thereon. And nevertheless let the lord of the franchise be attached that he should present

dum se, si possit, de prædicta transgressione. Et quam quidem si advocaverit, vel defendere non possit, capiatur illa libertas in manū domini regis, ꝑ voluntate dñi regis detinenda; quia libertatem meretur amittere, qui permissa sibi abutitur potestate. Et in primo casu, licet vicecom̃ ingredi possit cûm præceptū inde habuerit, nihilominus si ballivus non venerit ad diem suum ꝓcedatur contra ipsum de defalta, s. q̄ non attachietur sed quòd resum̄oneatur, et si ad resum̄onitionem non venerit, tunc amercietur graviter, ut de term̃ S. Trinitatis anno regni regis H. tertio.

8. Si clericus securitatem invenire noluerit propter privilegium ordinis.

Item excusari poterit vic. ꝑpter privilegium clericorum, ut si p̄ceptum domini regis habuerit de attachiando aliquem qui clericus sit, & qui plegios invenire noluerit ꝑpter privilegium clericale, nec laicum feodum habuerit ꝑ quod possit distringi, nec debet dominus rex manus in eos mittere, et cùm in eos coertionem non habeat, maximè in delictis & transgressionibus sicut in majoribus criminibus, nullum aliud supererit remedium nisi quòd ex parte dñi regis mandetur ordinariis loci qui baronias habent, sicut archiepiscopis, episcopis, et aliis in quorum diocesibus tales sunt manentes qui attachiari debent, vel beneficia ecclesiastica habuerunt, et in quos dominus rex habet coertionem propter baronias suas, quòd faciant tales venire, et sic fiat talis irrotulatio: A. optulit se quarto die versus B. de placito tali &c. Et B. non venit, & præceptum fuit vicecom̃ q̄ attachiaret eum, et vicecom̃ mandavit q̄ prædictus B. clericus est, et quòd noluit plegios invenire, nec habet laicum feodum per quod potuit distringi, et ideo mandatum est ordinario loci,

himself on the day aforesaid to defend himself, if he can, for the aforesaid transgression. And which indeed if he has avowed it or cannot defend himself, let his franchise be taken into the hand of the king, to be detained at the pleasure of the king, because he deserves to lose his franchise, who abuses a power allowed to him. And in the first case, although the viscount may enter, when he has a precept thereon, nevertheless if the bailiff has not appeared on the appointed day, let proceedings be had against him for his default, to wit, not that he should be attached, but that he should be resummoned, and if he should not have come on his resummons, then let him be heavily amerced, as in Holy Trinity term in the third year of the reign of king Henry.

8. If a cleric has refused to find security on account of the privilege of his order.

The viscount may also be excused on account of the privilege of clerics, as if he has received a precept from the lord the king to attach a person, who is a cleric, and who has refused to find sureties, on account of his clerical privilege, and who has no lay fee by which he may be distrained, and the lord the king ought not to lay hands upon them, and since he has no coercion over them, especially in delicts and transgressions as in greater crimes, there will remain no other remedy except that on the part of the lord the king a mandate should go to the ordinaries of the place, who have baronies, as to archbishops, bishops, and others within whose dioceses the persons to be attached are abiding, or have ecclesiastical benefices, and against whom the king has coercion on account of their baronies, that they should cause such persons to appear, and let the enrolment be after this form: A. has presented himself on the fourth day in answer to B. on such a plea, &c., and B. has not appeared, and it has been enjoined upon the viscount that he should attach him, and the viscount has sent word that the aforesaid B. is a cleric and has refused to find sureties, and has no lay fee upon which a distress could be levied, and therefore a mandate has

sicut archiepiscopo, episcopo, et hujusmodi, quòd faciat talem clericum venire ad talem diem, nisi ita sit q̃ fortè testatum sit, quòd talis clericus habeat laicum feodum et catalla in laico feodo per quæ distringi possit. Et vicecom̃ per fraudem mandaverit quòd nihil habuerit, et quo casu, fiat ut supra de fraudibus vicecom̃. Sed quid si clericus præbendam habuerit, laicum feodum scilicet, et noluerit plegios invenire, quæritur an vicecom̃ eum distringere possit statim per præbendam, vel si cûm præceptum habuerit de attachiando retornum fecerit ordinario, an ordinarius distringere possit canonicum per præbendam suam, videtur quòd neuter, nec vicecom̃ nec episcopus: vicecom̃ non, licet warrantum haberet ingrediendi libertatem sine episcopo vel alio ordinario, cûm episcop⁹ sit caput ecclesiæ & canonici mẽbra. Itẽ nec episcopus p̃ tale retornū, sine speciali præcepto domini regis, cùm
f. 443. canonicus adeo liberè teneat præbendam suam de ecclesia sicut ipse episcopus baroniam suam, et canonici sunt quasi unū corpus per se in ecclesia: et quãvis episcopus sit caput ecclesiæ, tamen canonici habent sua bona à bonis episcopi separata, & ideo cùm episcopus à dño rege speciale mandatum habuerit, ex hoc incipit habere jurisdictionem, et coertionẽ in p̃bendis quasi ordine observato. Forma brevis tunc talis est.

9. Breve ad episcopum vel alium, quod faciat venire clericum, cum non

H. Dei gratia &c., venerabili in Christo patri B. eadẽ gratia episcopo London salutẽ. Mandamus vobis q̃ venire faciatis coram justic. nostris &c. ad talem diem talẽ archidiaconū, vel talẽ decanum vel canonicum ad respondendū C. de tali placito &c. ut supra. Et tunc addatur hæc clausula, Et unde vicecom̃ noster

been sent to the ordinary of the place, as for instance to the archbishop, bishop and such like, that he should cause the said cleric to appear on a certain day, unless it should so be that by chance it has been testified that the said cleric has a lay fee, and chattels in a lay fee, through which he may be distrained. And the viscount has fraudulently reported, that he has nothing, and in which case, let proceedings be had as above stated concerning the frauds of the viscounts. But what if the cleric has a prebend, a lay fee for instance, and has refused to find sureties, it is questioned whether the viscount can distrain him forthwith through his prebend, or if when he has received a precept to attach him he has made a return to the ordinary, whether the ordinary may distrain a canon through his prebend, it seems that neither can, neither the viscount nor the bishop: not the viscount, although he may have a warrant to enter the franchise without the bishop or other ordinary, since the bishop is the head of the church, and the canons are its members. Likewise not the bishop through such a return, without a special precept from the lord the king, since the canon holds his prebend as freely from the f. 443. church as the bishop himself his barony, and the canons are as it were one body by itself in the church. And although the bishop is the head of the church, nevertheless the canons hold their goods separated from the goods of the bishop, and accordingly when the bishop has received a special mandate from the lord the king, from this time he begins to have jurisdiction and coercion over the prebends, as it were with observance of order. The form of the writ is then of this kind.

9. A writ to the bishop or other ordinary, that he should produce a cleric,

Henry by the grace of God, &c. to the venerable father in Christ B. by the same grace bishop of London greeting. We have commanded you that you cause to appear before our justiciaries &c. on such a day such an archdeacon, or such a dean or canon, to make answer to C. in such a plea &c. as above. And then let this clause

habeat, per quod distringat.

Midđ mandavit præfatis justiciariis nr̃is, quòd p̃dictus archidiaconus, vel talis alius qui clericus est, noluerit plegios invenire, nec habet laicum feodū p̣ q̣ distringi possit,[1] et habeatis ibi hoc br̃e. Teste &c. Si autē episcopus nihil fecerit ad mandatum domini regis, tunc fiat irrotulatio sic: A. optulit se quarto die versus B. de placito tali, et B. non venit, et aliàs p̃ceptū fuit vic. q̣ attachiaret eum, & vic. mandavit q̣ clericus fuit &c. ut supra, et ita q̣ mandatum fuit episcopo tali q̣ faceret eum venire, et quòd mitteret breve, et ipse nihil inde fecit. Et ideo sum̄oneatur episcopus quòd sit ad talem diem, & ibi habeat p̃dictum talem ad respondendum p̃dicto A. quare &c. secundū breve originalé, & ad ostendendū quare p̃dictum B. coram p̃fatis justiciariis ad talem diem non habuit, sicut ei mandatum fuit. Forma brevis talis est: Rex vicecomiti salutem. Sūmone p̣ bonos summonitores F. London episcopum quòd sit coram justiciariis &c. ad talem diem, & ibi habeat talem archidiaconum, vel talē clericum, ad respondendū tali de placito quare &c. ut supra. Et in fine, ad ostendendum quare non fecit eum venire corā justiciariis nr̃is ad talem diē, sicut ei mandatum fuit, et quare non misit br̃e &c. Ad quem diem aut facit eum venire aut non facit; si autē non, tūc observabitur solennitas attachiamentorū, sicut in aliis districtionibus, et statim distringatur episcopus per baroniam suam q̣ sit ad alium diē, et ibi habeat clericum p̃fatum ad respondendū &c. Et sum̄oneat episcopū q̣ tunc sit ibi auditurus judicium suū de hoc, quòd præfatū clericū non habuit ad talem

[1] MS. Rawl. C. 160, breaks off at the bottom of the second column of p. 231 of the MS., after the words "per quod distringi possit. One or more folios are missing, which are preserved in other MSS.

be added. And whereof our viscount of Middlesex has sent word to our justiciaries aforesaid, that the archdeacon aforesaid or a certain other person who is a cleric has refused to find sureties, and has no lay fee whereby he can be distrained, and produce there this writ. Witness &c. But if the bishop has done nothing upon the mandate of the lord the king, then let the enrolment be of this kind: A. has presented himself on the fourth day to make answer to B. on such a plea, and B. has not appeared, and it has been otherwise enjoined to the viscount to attach him, and the viscount has reported that he is a cleric &c. as above, and so that a mandate was sent to such a bishop to cause him to appear, and to return the writ, and the bishop has done nothing thereupon. And accordingly let the bishop be summoned that he be present on a certain day and there produce the aforesaid so-and-so to answer to the aforesaid A. wherefore &c. according to the original writ, and to show cause wherefore he has not produced the aforesaid B. before the aforesaid justiciaries on such a day as he was commanded. The form of the writ is of this kind: The king to the viscount greeting. Summon by good summoners F. the bishop of London that he present himself before our justiciaries &c. on such a day, and produce there archdeacon so-and-so or the cleric so-and-so to answer to so-and-so concerning a plea wherefore &c. as above. And at the end to show cause wherefore he has not caused him to appear before our justiciaries on such a day as he was commanded, and wherefore he has not returned the writ &c. On which day he either causes him to come or he does not; but if not, then the solemn order of attachments shall be observed as in other distresses, and let the bishop be forthwith distrained through his barony that he present himself upon another day, and there produce the aforesaid cleric to answer &c. And let him summon the bishop that he be there present to hear his own judgment on the matter that he did not present

when he has nothing wherewith he can be distrained.

diem &c. sicut ei mandatum fuit, et fiat irrotulatio sic: A. optulit se quarto die versus B. de tali placito &c. ut supra. Et B. non venit, et aliàs mandatū fuit episcopo quòd faceret eum venire ad talem diem. Ad quem diem non fecit eum venire, et ita q̃ p̃ceptū fuit vicecom̃ quòd summoneret eum q̃ esset ad hunc diem, et ibi haberet p̃dictum B. ad respondendum. Et similiter quòd episcopus esset ad ostendendū quare non fecit eum venire ad aliū diem, sicut ei mandatū fuit. Et episcopus non venit, nec habuit ipsum B., et ideo distringatur per baroniam suam q̃ sit ad talem diem, et ibi habeat prædictum B. ad respondendum, &c. Et ipse episcopus sit auditurus judicium suum de hoc quòd ipsum B. &c. Forma brevis talis est, &c.

10. Breve, si episcopus vel alius ordinarius f. 443 b. non habuerit clericum ad primum diem, quod episcopus distringatur.

Rex vicecomiti salutem. Præcipimus tibi quòd distringas F. London episcopum per terras suas quas tenet in baronia in comitatu tuo, quod sit coram justiciariis &c. ad talem diem, & ibi habeat talem clericum ad respondendum tali de tali placito &c., et similiter ad audiendum judicium suum de hoc q̃ præfatum clericum non habuit ad talem diem, sicut ei mandatum fuit, et habeas, &c. Ad quem diem si non venerit episcopus nec clericus, procedatur contra ipsum clericum de cōtemptu secundū considerationem curiæ, et ne maleficia remaneant impunita, apponat rex manum suam in defectu episcopi, ita quòd clericus arrestetur et detineatur quousq̃ episcopus eum petierit ex officio suæ jurisdictionis ut ei liberetur, vel ex certa causa detentus remaneat, nec ꝑpter hoc vic. nec ballivi

the aforesaid cleric on such a day &c. as he was commanded, and let the enrolment be in this manner: A. has presented himself on the fourth day in answer to B. on such a plea &c. as above. And B. has not come, and it was before commanded to the bishop that he should cause him to appear on such a day. Upon which day he did not cause him to appear, and so that it was enjoined upon the said viscount that he should summon him to appear on this day and there produce the aforesaid B. to answer. And in like manner that the bishop should be present to show cause wherefore he did not cause him to appear on another day as he was commanded. And the bishop has not appeared, nor has he produced the said B.; and accordingly let him be distrained through his barony that he be present on a certain day, and there produce the aforesaid B. to answer &c. And let the said bishop be present to hear judgment against himself on this matter that the said B. &c. The form of the writ is of this kind.

10. A writ, if the bishop or other ordinary has not f. 443 b. produced a cleric on the first day, that the bishop should be distrained.

The king to the viscount greeting. We have enjoined that you should distrain F. bishop of London by the lands which he holds in his barony in your county that he should present himself before our justiciaries &c on such a day and there produce such a cleric to answer to so-and-so on such a plea &c., and in like manner to hear judgment against himself on this matter that he has not produced the aforesaid cleric on such a day as he was commanded, and produce there &c. On which day if the bishop has not appeared nor the cleric, let proceedings be had against the cleric for contempt according to the resolution of the court, and that misdemeanors may not remain unpunished, let the king apply his hand in the default of the bishop, so that the cleric be arrested and be detained until the bishop shall have claimed him officially as being under his jurisdiction that he may be delivered up to him, or remain detained for a certain cause, nor on this account let the viscount or his bailiffs

sui pœnam incurrant, cùm executio juris non habeat injuriam. Episcopus autem et superiores possunt pro injuria et pro crimine arrestari. Posset etiam episcopus latronem fugientem ad ecclesiam impunè expellere, et ita quòd irregularis non teneretur, si latro exire nollet et stare judicio regis et regni. Debet enim gladius juvare gladium, et unde gladii sunt duo, spiritualis vz. et temporalis. Item cùm clericus non venerit ad diem suum, episcopus venire possit vel mittere et excusare se quòd clericum habere non poterit, dicere enim possit quòd clericus nullum habet beneficium in diocesia sua per quod possit distringi. Item etsi beneficium habuerit, quòd scholaris sit et vacans in scholis Parisiis ultra mare, et fecit quod potuit & sequestravit eum per p̃bendam suam, & alia beneficia sua, et nescivit ulterius quid facere posset, et unde supersedendum erit (ut videtur) donec clericus redierit q̃ capi posset et coerceri. Et unde si episcopus tunc noluerit, hoc faciat vicecom̃ in defectu episcopi ratione supradicta.

Cap. XXXIII.

1. De rebus communibus inter vicinos dividendis. Britton, iii. ch. vii. Fleta, v. ch. 9, § 1–4.

Est autẽ inter alias actiones actio mixta, q̃ datur tam in rem q̃m in personam, sicut actio de com̄uni dividundo, ubi uterq̃ actor uterq̃ reus, & ubi sine affinitate et parentela habẽt aliquam extraneæ psonæ potestatem ad rem aliquam dividendam quæ inter eos jacet in com̄uni, sicut sunt vicini & omnino extranei. Item est alia actio mixta quæ dicitur actio familiæ herciscundæ, & locum habet inter eos qui com̄unem habent hæreditatem dividẽdam: sed hæ duæ actiones

incur any penalty, since the execution of right carries with it no wrong. The bishop also and the superiors may arrest for an injury and a crime. The bishop also may expel with impunity a robber who has fled for refuge to a church, and so that he should not be held to be irregular, if the robber will not go forth and stand the judgment of the king and of the realm. For sword ought to aid sword, and whereof there are two swords, the spiritual forsooth, and the temporal. Likewise when a cleric has not appeared on the day appointed to him, the bishop may come or send and excuse himself that he cannot produce the cleric, for he may say that the cleric has no benefice in his diocese, whereby he can be distrained. Likewise, although he may have a benefice, that he is a scholar and is employed in the schools of Paris or elsewhere, and he has done what he could, and has sequestrated his prebend, and his other benefices, and he knows not what else he can do, and whereupon proceedings are to be superseded, as it seems, until the cleric has returned so that he may be apprehended and coerced. And whereupon if the bishop be unwilling, let the viscount do this in default of the bishop for the reason above said.

Chapter XXXIII.

1. Of dividing common things between neighbours.

There is also amongst other actions a mixed action, which is allowed against as well the thing as the person, as an action for dividing a common estate, where each party is plaintiff and each is defendant, and where without affinity or relationship persons strangers in blood to one another have some power to divide a certain estate which lies between them in common, according as they are neighbours and altogether strangers in blood. Likewise there is another mixed action, which is called *actio familiæ herciscundæ*, and it has a place between those who have a common estate to be divided; but these two

Azonis summa in iii. librum Codicis Rubricæ Familiæ erciscundæ, et Finium regundorum.

non statim nascuntur, cùm hereditas vel alia res in cōmuni tenetur, sed ex eo tempore quo quis eorum velit rem dividere: & locum habet (ut videtur) inter cohæredes ubi agitur de ꝑparte sororum, vel inter alios ubi res inter partes & cohæredes dividi debet, in ꝑparte, sive ratione personarum inter quas res dividi debeat, sicut sunt plures sorores quæ sunt quasi unus hæres, vel inter plures fratres qui sunt quasi unus hæres ratione rei quæ divisibilis est inter plures masculos, & ubi quilibet eorum est actor et quilibet reus, et ideo dicitur hæc actio mixta. Et hoc casu quilibet dicetur actor qui primò ꝓvocaverit ad judicium. Et in iis casib⁹, si cùm ꝑticipes vel cohæredes partem suam petierint rationabilem versus suos participes et cohæredes, & illi defaltam fecerint, capienda erit terra in manum dñi regis de cōmuni hæreditate ꝑ ea ꝑte quæ contingit petentē, & ita erit districtio in hoc casu realis & non personalis. Itē & est actio tertia de finibus agrorum inter vicinos terminandis et definiendis, quæ dicitur actio finium regundorum, quæ idem est quòd rex præcipiat ꝙ rationabiles divisæ fiant inter vicinos, et hoc est valde subtilis inter alias, & ubi pro defectu ejus qui non queritur debet pars illa de qua cōtentio est capi in manum dñi regis, & sic erit districtio realis et non personalis. Sunt etiam aliquando duæ actiones quæ cōprehenduntur sub uno brevi, et quarū una modo utentium personalis est, et altera realis, & si bene judicarentur quælibet earum frivola esset et inutilis ut supra.

f. 444.

Inst. Just. De Actionibus iv. 6. § 20.

2. Quod solennitas

Non semper (ut paulo ante dictum est in parte) observari debet solennitas attachiamentorum in actioni-

actions do not arise forthwith when an inheritance or other thing is held in common, but from that time when any of them wishes to divide the estate: and it has a place (as it seems) between coheirs where the action is for a proportionate part of sisters, or between other persons where an estate ought to be divided between parceners and coheirs, in proportionate parts, or with reference to the persons between whom the thing ought to be divided, such as are several sisters who are as it were one heir, or between several brothers who are as it were one heir in respect of a thing which is divisible amongst several males, and where each of them is a plaintiff and each is a defendant, and there the action is called a mixed action. And in these two cases, if when the parceners or coheirs have claimed their reasonable part against their co-parceners or coheirs, and the latter have made default, land will have to be taken into the hand of the lord the king of the common inheritance in proportion to the part which belongs to the claimant, and so there shall be a real and not a personal distress in this case. Likewise there is a third action concerning the boundaries of fields to be determined and defined between neighbours, which is called an *actio regundorum finium*, which is the same as when the king enjoins that reasonable divisions be marked out between neighbours, and this is very subtle amongst others, and where on account of the default of him who is not a complainant the said part concerning which there is a contention ought to be taken into the hand of the lord the king, and so there will be a real and not a personal distress. There are also sometimes two actions which are comprised under one writ, and of which one in the manner of those who use it is personal and the other real, and if it were well judged each would be frivolous and unprofitable as above. f. 444.

2. That the solemn

The solemn order of attachments ought not to be observed (as partly stated a little above) in all personal

attachiamentorum non sit ubique et in omni casu tenenda.

bus personalibus, tum ꝑpter privilegium & favorem cruce signatorū, quorū negotia maturitatem desiderant et instantiam. Item ꝑpter privilegium & favorē mercatorū eodē modo. Item ꝑpter causam sive necessitatē, ut in assisa ultimæ p̃sentationis, vel quare quis impedit præsentare, vel non permittit, propter lapsum sex mensium & hujusmodi. Item ꝑpter ipsam rem quæ tempore peritura esset, sicut de fructibus maturioribus & hujusmodi. Item in actione injuriarum, ꝑpter atrocitatem injuriæ quæ magna est, et contra pacem dñi regis. Item ꝑpter personam contra quem injuriatum est, ut si injuriatum sit dño regi vel reginæ, vel eorum liberis, fratribus, vel sororibus, vel eorum parentibus, et ꝑpinquis, in quibus casibus & cōsimilibus statim præcipiatur vic. q̄ habeat corpora talium ad respondendum talibus, secundū q̄ de antedictis sumi poterit exemplum. Et idem fieri debet si aliqua actio incidens sit principali actioni, et ubi, quamvis in actione principali observetur ordo attachiamentorū, tamen in incidenti non erit solennitas observanda, ut si cōtingat episcopum vel aliū ordinariū sum̄oneri quare nō habet clericū &c. Et in quibus casib⁹ oĩb⁹ cū p̃cipiatur vicecom̃ prima die q̄ habeat corpora taliū ad diē talē rationabilē, si absētes sint extra com̃ & nō in com̃ nec in civitate nec in villa, nō potest fieri mētio in fine br̃is secundū solitū cursū attachiamentorū de clausula ista, vz. & ad audiendū judiciū suū de plurib⁹ defaltis, cū nulla defalta p̃cesserit, sed loco illius clausulæ addatur in quolibet br̃i causa quare

actions as well on account of the privilege and favour of those who have vowed a crusade, whose affairs require readiness and instance. Likewise on account of the privilege and favour of merchants in the same manner. Likewise on account of the cause or the necessity, as in an assise of last presentation or of *quare impedit* as regards a presentation, or of *quare non permittit*, on account of the lapse of six months and such like. Likewise on account of the thing itself, which is perishable in time, as concerning crops over-ripe and such like. Likewise in an action for an injury, on account of the atrocity of the injury, which is great and against the peace of the lord the king. Likewise on account of the persons against whom the injury has been done, as if an injury has been done to the lord the king or to the queen, or to their children, brothers or sisters, or to their relatives or connections, in which and in similar cases let a precept go to the viscount that he should present the bodies of so-and-so to answer to so-and-so, according to what may be taken for an example from what has been above said. And the same may be done if any action be incidental to the principal action, and where, although the order of attachments be observed in the principal action, nevertheless in the incidental action the solemnity is not to be observed, as if it should happen that a bishop or other ordinary should be summoned for not producing a cleric &c. And in all of which cases when it is enjoined upon the viscount on the first day that he should produce the bodies of such and such persons on a certain reasonable day, if they be absent outside the county, and not in the county nor in the city nor in the vill, mention cannot be made at the end of the writ according to the usual course of attachments concerning that clause, namely, "and in "order to hear judgment against themselves concerning "the repeated defaults," since no default has preceded, but in the place of that clause let there be added in every

order of attachments is not to be observed everywhere and in every case.

tollitur dilatio, & solēnitas attachiamētorū: & fiat bꝛ̃e sic.

3. Si statim venire debeat reus propter privilegium actoris.

Rex vic. salutē. Præcipim[9] tibi q̄ ōni occasione & dilatione postposita, ꝑpter privilegiū et favorē cruce signatorū et mercatorū, quorū placitū instantiā desiderat, habeas corā justic. nr̃is ad talē diē, corpus talis ad respondendū tali cruce signato, vel mercatori, de placito quare &c. vel q̄ reddat ei &c. secundū formā bꝛ̃is originalis, & in fine apponatur aliq̄ cōminatoriū, tale vz. Et ita te habeas in hoc negotio ne ꝑ defectu tui ad te graviter capere debeam[9]. Et ita fiat de aliis causis supradictis, & quo casu, licet bꝛ̃e de habēdis corporib[9] faciat mentionē, tamē nihilominus locū habebit essoniū de malo veniendi, quāvis hoc esse videatur cōtra solitū judiciū essoniorū, quia quāvis tollatur solennitas attachiamētorū, tamē legitimā dilationem quam reus habet usque ad primū diem litigii, semper sequetur essonium de malo veniendi, ita quòd unicum habeat essonium antequam compareat. Item in criminalibus causis ubi sequi debet capitale judicium, vita videlicet vel mutilatio membrorum, non sequitur attachiamentum aliquod, sed corpus talis (quicunque fuerit ille) ab omnibus arrestetur̄ qui sunt ad fidem domini regis, sive inde præceptum habuerit sive non habuerit.[1]

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[1] "præceptum habuerit sive non." MS. Reg. 9. E. xv.; cui rubrica subjungitur, "Explicit liber "domini Henrici de Bratton de "juribus et consuetudinibus Anglie "canis."

FINIS.

writ the cause wherefore the delay and solemnity of attachments is not observed.

3. If the defendant ought to appear forthwith on account of the privilege of the plaintiff.

The king to the viscount greeting. We enjoin you, that postponing all excuse and delay, on account of the privilege and favour of parties who have vowed a crusade and of merchants, whose plea requires urgency, you should produce before our justiciaries on such a day the body of so-and-so, to answer to so-and-so who has vowed a crusade, or who is a merchant, concerning a plea wherefore &c., or that he render to him &c., according to the form of the original writ; and at the end let there be added a clause of commination, of this kind namely, "and "so conduct yourself in this matter, that we may not have "to deal severely with you on account of your default." And so let it be done in the other causes aforesaid, and in which case although the writ makes mention of producing their bodies, nevertheless an essoin for illness in coming shall have place, although this may seem to be against the usual judgment of essoins, because, although the solemnity of attachments is not observed, nevertheless an essoin for illness in coming will always follow the legitimate delay which a defendant has up to the first day of the law suit, so that he may have a single essoin before he appears. Likewise in criminal causes where a capital judgment ought to follow, namely life or mutilation of members, there does not follow any attachment, but the body of the said party (whoever he may be) may be arrested by every one who is of fealty to the king, whether he have a precept thereon or not.

THE END.

APPENDIX.

APPENDIX.

Placita apud Westm̃ corā dño rege in octᷓ Scī Michis anñ regñ ejusd xviii°.

Die Jovis ꝑxima post festū Sc̃i Dionis anñ reg̃ Henr̃ fit reg̃ J. xviii° corā dño rege ⁊ subsiptis. Provisum fuit ⁊ concessū a dño rege ⁊ a subsiptis oībz ⁊ aliis q̃d decet̄o cū talis bastardia obiciatr alicui in cur̃ dñi reg̃ q̃d natᵒ fuit añ m̃rīoniū contactū int̄ ꝑrem suū ⁊ m̃rem suam mittatr loq̃la ad eꝑm loci ad inquirendū utrᵒ tal natᵒ fuit añ ꝑdc̃um matimoniū vł post. Ita q̃d in inquisic̃oe illa cesset oīs apꝑllac̃o sicut in simplici bastardia de qua placitū trāsmissū erit ad cur̃ Xianitatis. Ita q̃d nulla apꝑlla iñ fiat exa regnū. Et ĩo decet̄o ita teneatr tā de illis de quibz judiciū est faciendū in cur̃ dñi reg̃ qa de placitis q̃ nōdum inciꝑuntr cū talis bastardia obiciatr.

E. Cant̃ Archiepꝰ.
R. Cicestr̃ Dñi Reg̃ Cancell.
R. Dunelm̃ Epꝰ.
Epꝰ Eliens̃.
Epꝰ Norwic̃.
Epꝰ Lond̃.
Epꝰ Bathoñ.
Epꝰ Exoñ.
Epꝰ Karl̃.
Epꝰ Heref.
Epꝰ Roff.

Comites.

R. Com̃ Cornub ⁊ Pict̃.
G. Com̃ Marescall.
J. Com̃ Linc̃.
W. Com̃ Warenñ.

J. Comes Cestr̃.
W. Coñ de Ferrar̃.
Th. Coñ Warrewic̃.
H. Coñ Kanc̃.
H. de Ver Coñ Oxoñ.
H. Coñ Hereford̃.
Sym̃ de Monteforti.
Rad̃ de Thony.
Philipp⁹ de Albiniaco.
Rad̃ fit̃ Nicħi.
Herb̃ fit̃ Mathi.
Joħ Marescalt̃.
Galfr̃ de Lucy.
Ric̃ de Argenteinn.
Hug̃ Dispensator.
Wilt̃ de Say.
Wilt̃ Bardof.
Wilt̃ de Cantilup̃ senior.
Wilt̃ de Cantilup̃ junior.
Ric̃ Syward.
Godefr̃ de Crawecūb̃.
Almaric⁹ de Sc̃o Amando.
Bertᵃm de Kuriol.
Engelard̃ de Cygoiñgny.
Rob̃ de Muchegros.
Bald̃ de Pauntoñ.
Herb̃ de Lucy.
Ric̃ fit̃ Hug̃.

The above record is contained in the Coram Rege Roll of Henry III. formerly preserved in the Tower of London, but now in the Public Record Office. From its heading it may be presumed that it was made at Westminster in the *eighteenth* year of the reign of Henry III. It is identical however in its purport, and in the names of the members of the king's council subscribed to it as witnesses, with the record that is inserted in Bracton's Treatise on Exceptions, ch. xix. § 9, and which

is stated by him to be the record of a constitution made by the king and his council on the Thursday next following the feast of St. Denis in the *twentieth* year of king Henry III. (supra, p. 290). Some further observations on this conflict of dates will be found in the Introduction of the present volume. There can be no doubt as to the authenticity of the Coram Rege Roll. From entries in the Patent and Close Rolls of 18 Henry III. it appears that king Henry was at Westminster on 7th, 8th, 9th (St. Denis's day), 11th, and 12th of October of that year, and so far they are adminicular to this entry in the Coram Rege Roll.

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